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THE WORK OF THE MISSOURI SUPREME COURT FOR THE YEAR 1948

STATISTICAL SURVEY

ROBERT LEE SMITH*

This survey is based upon the opinions handed down by the supreme court in 1948. Of the 254 majority opinions,[1] three dealt with two separate cases, one with three separate cases, and one opinion disposed of five separate cases, thus making a total of 263 cases decided during the year. Eight of the opinions were originally written as divisional opinions and later adopted by the court *en banc*. There were three separate concurring opinions, three dissenting opinions, and one supplemental opinion. In addition, there were nine separate opinions on motions for rehearings or to transfer to the court *en banc*.

There were no changes in the personnel of the court during the year.

Table I indicates the distribution of the majority opinions among the divisions of the court.

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

En Banc	45
Division Number One	116
Division Number Two	93
Total	254

Table II is a classification of the majority opinions into categories indicating, as nearly as possible, the dominant issue involved. Because of its nature, this table is only an approximation, since many cases involved more than one such issue and, therefore, an arbitrary choice was frequently necessary.

*Chairman, Board of Student Editors.

1. Total majority opinions for the preceding five years are as follows: 1943, 306; 1944, 251; 1945, 197; 1946, 181; 1947, 244.

TABLE II

Topical Analysis of Decisions

Statutes	2
Taxation	6
Torts (other than Negligence)	9
Trusts	5
Unions	3
Wills and Administration	8
Workmen's Compensation	4
Total	254

Table III shows the disposition of the cases decided in 1948. The wording, so far as practical, is that of the judges and commissioners in their opinions. For this reason, some of the categories, separated because of differences in phraseology, indicate identical final dispositions.

TABLE III

Disposition of Litigation

Appeal Dismissed	3
Appeal Dismissed and Cause Remanded	1
Alternative Writ of Mandamus made Preemptory	1
Alternative Writ of Mandamus Made Permanent as Modified	1
Cause Transferred to Court of Appeals	7
Contempt Proceedings Dismissed	1
Decree Affirmed	6
Decree Affirmed and Cause Remanded for Further Proceedings in Accordance with It	1
Decree Affirmed in Part and Reversed in Part and Remanded	1
Decree and Judgment Affirmed	4
Decree and Judgment Affirmed and Cause Remanded For any Necessary Further Proceedings	1
Judgment Affirmed	127
Judgment Affirmed and Cause Remanded	1
Judgment Affirmed and Cause Remanded With Directions	1
Judgment Affirmed as Modified	1
Judgment Affirmed as to Reinstatement and Payment of Salary, but Reversed as to Award of Damages	1
Judgment Affirmed in Part and in Part Reversed and Remanded with Directions	3
Judgment Affirmed on Condition of Remittitur, Otherwise Reversed and Remanded	6

Judgment and Decree Affirmed in Part and Reversed and Remanded with Directions in Part	1
Judgment and Sentence Affirmed	1
Judgment Dismissing Plaintiff's Petition Reversed and Cause Remanded with Directions	2
Judgment Modified and Respondent Disbarred	1
Judgment of Disbarment in Accordance with Opinion	1
Judgment of Dismissal Affirmed	4
Judgment Reversed	16
Judgment Reversed and Cause Remanded	22
Judgment Reversed and Cause Remanded for New Trial	5
Judgment Reversed and Cause Remanded with Directions	8
Judgment Reversed and Defendant Discharged	2
Judgment Reversed as to One and Affirmed as to One Defendant	1
Judgment Reversed with Directions to Enter a Judgment for Defendant	1
Judgment set Aside with Directions	1
Opinion of Court of Appeals Quashed, Judgment Reversed and Cause Remanded with Directions	1
Order and Judgment of Dismissal Affirmed	1
Order and Judgment of Trial Court Affirmed	1
Order Granting New Trial Affirmed	1
Order Granting New Trial Affirmed and Cause Remanded	3
Order Granting New Trial Reversed and Cause Remanded with Directions	2
Order Granting New Trial Sustained but Cause Remanded for Entry of Decree in Conformity with Opinion	1
Orders Affirmed	1
Petitioner Ordered Discharged	1
Preemptory Writ of Mandamus Awarded	3
Preliminary Rules in Prohibition Previously Issued Discharged	2
Preliminary Writ of Prohibition Made Absolute	2
Records of Circuit Court Quashed, Except insofar as the Judgment Denied Petitioner's Prayer for Discharge from Custody of the Warden	1
Writ of Certiorari Quashed	1
Total	254

Table IV shows the disposition of motions subsequent to decision so far as records are now available. The instances in which rehearings were granted, or the cause transferred to the court *en banc* represent the main categories necessarily omitted.

TABLE IV

MOTIONS SUBSEQUENT TO DECISION

Motion for Rehearing and to Modify Opinion and Judgment Denied	1
Motion for Rehearing Denied	77
Motion for Rehearing Denied and Opinion Modified	1
Motion for Rehearing or to Transfer to Court *En Banc* Denied	38
Motion for Rehearing, to Modify Opinion, or to Transfer to Court *En Banc* Denied	1
Motion to Modify Opinion Sustained	1
Motion to Transfer to Court *En Banc* Denied	2
Motion to Transfer to Court *En Banc,* or for Judgment on the Pleadings, or for a New Trial Denied	1
Total	122

APPELLATE PRACTICE

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

While the provisions of the new constitution of Missouri, adopted in 1945, make no material changes in the law, under the old constitution, with respect to appellate jurisdiction[1] the changes in other laws required by the new constitution are creating new questions with reference to the jurisdiction of the supreme court. In the year under review seven cases were transferred to the appropriate court of appeals for lack of jurisdiction in the supreme court. Two of these cases involve questions arising under the Unemployment Compensation Law.

In *Parker v. Unemployment Compensation Commission,*[2] an appeal from a decision of the Unemployment Compensation Commission denying compensation to plaintiff, the court points out that, in accordance with the

*Attorney, Kansas City. LL.B., Kansas City School of Law, 1912.

1. MO. CONST. Art. V, § 3.

directions contained in the new constitution, the reorganization of the executive department of the government substituted the Division of Employment Security for the Unemployment Compensation Commission and resulted in clothing that branch of the government with power as a public quasi corporation. Consequently, it is there held that the director of the Division of Employment Security is not a proper party and that the division itself will be regarded as a public corporation. Prior to these changes the court, as is shown in the *Parker* opinion, had consistently held that exclusive appellate jurisdiction of such cases was in the supreme court because the individual members of the Commission were necessary parties and were state officers; but the effect of the change in the law transferring the administration of the Act to the newly created Division of Employment Security was to eliminate the necessity for making the director of that division a party and consequently the suit did not involve a state officer within the jurisdictional sense. Accordingly, the case was transferred to the court of appeals.

In *Howell v. Division of Employment Security*,[3] another action to review a decision of the Unemployment Compensation Commission, the court followed the ruling in the *Parker* case on the point that the division itself as a legal entity was the proper party to the proceeding and that the court did not have jurisdiction on the ground that a state officer was a party. The opinion then takes up the question of whether or not the fact that the issue below involved the liability of appellant for the payment of taxes as employers under the Compensation Act, conferred jurisdiction upon the supreme court on the ground that the construction of the Revenue Law of the state was involved. The conclusion reached is that the contributions required to be paid by the employer under the Act do not constitute revenue of the state, and that the construction of revenue laws was not directly and primarily involved in the decision. Accordingly it was held that the court did not have jurisdiction of such cases as cases involving construction of the revenue laws and transferred the cause to the court of appeals.

Analogous in principle to the *Parker* and *Howell* cases is the decision of the court in *Trokey v. United States Cartridge Co.*,[4] an appeal in an equity suit brought against the Workmen's Compensation Commission and against plaintiff's employer and its insurance carrier to set aside a compromise com-

2. 214 S.W. 2d 529 (Mo. 1948).
3. 215 S.W. 2d 467 (Mo. 1948).
4. 214 S.W. 2d 526 (Mo. 1948).

pensation settlement and compel the commission to hear a claim for additional compensation. It was contended that the supreme court has jurisdiction because the Division of Workmen's Compensation is a party to the action, but the court points out that it looks beyond mere formal allegations to determine its jurisdiction and that the three individual commissioners are wholly unnecessary parties to the action, the commission itself was not a state officer, the necessary jurisdictional amount was not involved, and ordered the case transferred to the court of appeals.

In *Hydesburg Common School District v. Rensselaer Common School District,*[5] the court held that the constitution of 1945 makes no material change in the provisions of the previous constitution with respect to its jurisdiction, and adhered to the rule previously announced that a school district is not a political subdivision of the state in the jurisdictional sense. Since no other possible ground for its jurisdiction appeared, the cause was transferred to the court of appeals.

In *City of St. Louis v. Friedman,*[6] the court retained jurisdiction on the ground that a constitutional question was involved and, in doing so, relaxed somewhat the harshness of the former rule that the constitutional question must be raised at the first opportunity and the particular provision of the constitution alleged to have been violated must be pointed out, by holding that the failure to point out by section and article the particular constitutional provision is not fatal where the constitutional right claimed is stated with sufficient clearness to apprise the trial court and the appellate courts of the right claimed, stating, "that is substantial compliance with our requirements in this respect."

In *Lynn v. Stricker,*[7] an appeal from a decree construing a will was transferred to the court of appeals because the calculations of the court disclosed the fact that the amount in dispute was not within the monetary jurisdiction of the court even though the inventory of the estate, after deductions for debts and costs of administration, was in excess of the jurisdictional limitation. The court pointed out that certain items were not in dispute on the appeal and that these items, when deducted from the total, reduced the amount in dispute below the jurisdiction of the court.

In *Cherry v. Cherry,*[8] an appeal in an action for partition, the case was transferred to the court of appeals under the well established rule that

5. 214 S.W. 2d 4 (Mo. 1948).
6. 216 S.W. 2d 475 (Mo. 1948).
7. 207 S.W. 2d 290 (Mo. 1948).

partition actions do not ordinarily involve title to real estate, the court pointing out that there was no issue as to the dower rights of the widow such as had been the case in *Ferguson v. Long*.[9] The court also declined to retain jurisdiction in *Pursley v. Pursley*,[10] where the appeal was from a decree giving plaintiff an equitable lien upon defendant's real estate and ordering the property sold to satisfy the lien. The court again applied the rule that title to real estate must be directly, and not merely incidentally, involved in order to confer appellate jurisdiction upon the supreme court.

Questions for Review

In the November 1948 issue of the *Missouri Law Review*,[11] the decision of the court in *In re Duren*[12] was reviewed in connection with the power of an appellate court to base its decision of an appeal upon a question or principle of law not presented by the litigants either to the trial court or to the appellate court. It was pointed out that the decision of a question upon which the court has not been aided by the arguments and contentions of the parties offends the fundamental principles of due process of law; and it was suggested that, when a reviewing court discovers what it regards as controlling issues which have not been made the subject of appellate presentation, the better practice would be for the court to set aside its order of submission and direct the parties to appear and present their views upon the discovered issue. That course was followed by the United States Court of Appeals, Ninth Circuit, in the case of *United States v. Payne*,[13] thus affording an opportunity to the parties to be heard upon the issue upon which the decision was finally based. In the case of *Kindred v. Anderson*,[14] however, the court has again announced its view that it has the right to consider issues not raised by the parties, and to base its decision upon such issues, because of the provision of Supreme Court Rule 3.27 relating to plain errors. It will be noted that the court does not consider whether or not such a decision is a denial of due process of law, nor does the opinion undertake to analyze the so-called plain error rule. The rule itself was designed to afford relief from oversights occurring in the trial courts, and gives the *litigant* the right,

8. 210 S.W. 2d 78 (Mo. 1948).
9. 341 Mo. 182, 107 S.W. 2d 7 (1937).
10. 213 S.W. 2d 291 (Mo. 1948).
11. 13 Mo. L. Rev. 351 to 353 (1948).
12. 355 Mo. 1222, 200 S.W. 2d 343 (1947).
13. 72 F. 2d 593 (C.C.A. 9th 1934).
14. 357 Mo. 564, 209 S.W. 2d 912, 921 (1948).

on appeal, to join appellate issues even though the basis therefor has not been *preserved* for review in the record. The extension of that rule to the appellate field is contrary to the principles of due process of law and appears to do violence to the language of the rule itself. However, notwithstanding the decision in the *Kindred* case, it is to be noted that the court, in *Benham v. McCoy*,[15] respected a stipulation of the parties as to the appellate issues and refused to consider alleged instruction errors not covered by the stipulation.

In *Baerveldt & Honig Construction Co. v. Dye Candy Co.*,[16] the court reviewed at length the question of whether or not the report of the referee confirmed by the court which, under Section 1159, Mo. Rev. Stat. Ann., has effect as a special verdict, precludes the court from reviewing both the law and the evidence as in other suits of an equitable nature, as is provided by Section 114 (d) of the code. The opinion holds that the seeming conflict between the two sections must be resolved in favor of the latter section in order to avoid an unconstitutional classification, and the rule is announced that, in all court cases, whether the facts have been found by the court or by a referee, the appellate court can and should review the case both upon the law and the evidence.

The Right of Appeal

In *Jones v. Williams*[17] the court held that an order sustaining a motion to dismiss a petition constitutes a final order from which an appeal can be taken; and, in the course of the opinion, the court points to the difference between a demurrer under the old practice and the motion to dismiss under the new code, calling attention to the fact that the sustaining of a demurrer did not have the effect of dismissing the cause of action because of the right to file an amended petition, while, under the code, a dismissal with prejudice operates as a final adjudication. In the *Jones* case the plaintiff had followed the trial court's order dismissing the petition with a motion for a new trial which was overruled before the appeal was taken. The court has not yet definitely ruled that a motion for a new trial is necessary for proper appellate review of an order sustaining a motion to dismiss a petition, but it would seem that a motion for a new trial in such a case would have no function to perform. There never having been a trial upon the merits, no *new* trial

15. 213 S.W. 2d 914, 917 (Mo. 1948).
16. 357 Mo. 1072, 212 S.W. 2d 65 (1948).
17. 357 Mo. 531, 209 S.W. 2d 907 (1948).

could be granted. However, a somewhat analogous situation was before the court in *Johnson v. Kansas City Public Service Co.*[18] where, after a jury verdict for plaintiff, the defendant filed both a motion for a new trial and a motion for directed verdict. The latter motion was sustained but the court made no order on the motion for new trial. It was held that the order sustaining the motion for a directed verdict and the record entry of a judgment made according to that motion was a final judgment from which an appeal would lie and that the failure of the trial court to overrule the motion for new trial did not render the appeal premature. The opinion contains much of interest with respect to the preservation of points for review by the rulings of the court upon after judgment motions.

In *Bruun v. Katz Drug Co.*,[19] where the original suit was against a corporation whose corporate charter was forfeited after it had become a party to the litigation and thereafter plaintiff attempted, by motion, to have the directors and a new corporation substituted as parties, it was held that an order overruling such motion was not a final judgment and not an appealable order. Similarly, in *Koplar v. Rosset*,[20] where the trial court, after a remand, denied leave to file a supplemental petition, it was held that the order denying leave was not an appealable order because there still remained issues not determined and there was no final judgment in the case. Also, in *Hanover Fire Ins. Co. v. Commercial Standard Ins. Co.*,[21] where the suit was against two defendants and the trial court sustained a motion to dismiss the petition as to one defendant, it was held that such dismissal did not affect the cause as to the other defendant and that an appeal therefrom was premature.

In *State* ex rel. *Fawkes v. Bland*,[22] it was decided that appeals in divorce cases are now governed by Section 129 of the new code, prescribing the time and manner of taking appeals, and not by Section 1524, Mo. Rev. Stat. Ann. which provides that appeals in divorce matters must be taken during the term at which the judgment appealed from was rendered. The holding is based upon the court's construction of its Rule 3.02 (a) and 3.02 (c).

In *Holt v. McLaughlin*[23] appellant had been adjudged guilty of contempt of court and appealed. Noting the difference between civil and crim-

18. 214 S.W. 2d 5 (Mo. 1948).
19. 211 S.W. 2d 918 (Mo. 1948).
20. 214 S.W. 2d 417 (Mo. 1948).
21. 215 S.W. 2d 444 (Mo. 1948).
22. 357 Mo. 634, 210 S.W. 2d 31 (1948).
23. 357 Mo. 844, 210 S.W. 2d 1006 (1948).

inal contempt the court held that the appeal was from an adjudication of criminal contempt and that there is no statutory provision for the right of appeal in such cases, the method of review being by habeas corpus. Accordingly the appeal was dismissed. However, in the case of *In re Conner,*[24] where the informant in a disbarment proceeding had appealed from a judgment suspending respondent for ninety days from the practice of law, the court, in a well reasoned opinion, declined to dismiss the appeal on the ground that there was no statutory provision for appeal in such cases and, resorting to its Rule 5.11 by which the court, in the exercise of its inherent power to discipline the Bar, provided for a *review* of disbarment proceedings, held that any appropriate proceeding to accomplish the purpose of review is entirely proper, and refused to give to the word "appeal" a narrow technical construction as referring only to a statutory right. The proceedings were reviewed by the court in that case and the order suspending the respondent was modified to provide for his absolute disbarment.

Records and Briefs

In *DeMayo v. Lyons*[25] the court refused to dismiss an appeal on the ground that appellant's statement was not a fair and concise statement of the facts without argument, holding that dismissal of an appeal is a drastic penalty and that such penalty will not be applied unless fully warranted by the violation complained of. The same result was reached by the court in *Kirkpatrick v. Wabash R. R.*,[26] where it had been contended that appellant's brief was intermingled with argument and with conclusions. Because the court was able to glean from the statement the facts determinative of the sole issue on appeal it was again stated that the harsh remedy of dismissal would not be applied.

In *Donati v. Gualdoni,*[27] an appeal from an order granting a new trial after a jury verdict, respondents, after service of their brief, moved the court for an order correcting the transcript of the record to include a memorandum which had been prepared and filed by the trial judge. The court ruled that, absent consent of the parties, the motion to correct the transcript was too late and, under Rule 1.03, overruled the motion.

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24. 357 Mo. 270, 207 S.W. 2d 492 (1948).
25. 216 S.W. 2d 436 (Mo. 1948).
26. 357 Mo. 1246, 212 S.W. 2d 764 (1948).
27. 216 S.W. 2d 519 (Mo. 1948).

EFFECT OF DECISIONS

In *Abrams v. Scott*[28] the appeal was from a judgment entered upon the court's mandate on a prior appeal. The second appeal was for the purpose of determining whether or not the new judgment entered by the trial court was in conformity with the mandate. In a clarifying opinion, the court ruled that the words "for further proceedings in accordance with this opinion," or words of similar import, add nothing which would not have necessarily been implied had the mandate merely remanded the cause. It was pointed out that every mandate is in the nature of a special or limited power of attorney authorizing the lower courts to take such steps as are directed by the mandate. The conclusion of the court is that, whenever the appellate court reverses and remands the judgment of a trial court the remand is with directions, the specific directions to be determined from the mandate and the opinion of the appellate court. It can never be assumed, when a case has been remanded, that all the issues are open for a new trial. That may be the effect of the opinion, but it is not a necessary effect unless the language of the opinion so indicates.

CRIMINAL LAW

HOWARD B. LANG, JR.*

During the year 1948 the Supreme Court of Missouri did not pass on any cases of first impression in the field of criminal law, but, rather, was called on primarily to apply already well established principles.

I. PROCEDURE BEFORE TRIAL

A. *Search and seizure*

There were two interesting cases involving the admissibility of evidence obtained by search and seizure conducted by an officer. In *State v. Carenza*[1] the court sustained the lower court in connection with the taking of fingerprints and affirmed the lower court which had ruled that the search and seizure of a pistol was lawfully made. The evidence showed that the defendant on one occasion had not objected to the taking of fingerprints which were used in evidence against him, but on the second occasion had

28. 357 Mo. 937, 211 S.W. 2d 718 (1948).

*Former Prosecuting Attorney, Boone County, Columbia. A.B., University of Missouri, 1934, LL.B. 1936, M.A. 1937.

1. 357 Mo. 1172, 212 S.W. 2d 743 (1948), noted 14 Mo. L. REV. 111 (1949).

objected to the taking of his fingerprints. The court ruled that the defendant's motion to suppress the fingerprint evidence was properly sustained as to those which were taken over his objection and was properly overruled as to those that were taken without his objection.

In the same case the officers, at the time the defendant was arrested at his home, made a search for the pistol used in the offense but failed to find it during the twenty-five minutes that they were at the home of the defendant and before the defendant was taken to the station. An officer was left at the house and some seven or eight hours later an officer returned to the place and continued to search it for several hours, at which time the defendant's wife came to the place and the search was continued. After the arrival of the wife the pistol was found. The court held that the pistol found was admissible in evidence and reaffirmed the established principle that search of the place of the defendant's arrest was lawful and search of the premises where the arrest was made could be made without a search warrant where incident to the arrest.

The court in another instance remanded the case because of error by the trial court in admitting evidence which was held to have been improperly seized. After the defendant's arrest the defendant gave the keys to his car to a highway patrolman with instructions to take the car to the farm of defendant's wife. Defendant was apparently not in the car when arrested. The officer held the car for three days. No search warrant was ever issued, but the car was searched without it and stolen narcotics found therein. The trial court properly sustained a motion to suppress this evidence. After the defendant gave bond, he asked that the patrolman give him his car. The patrolman went to the garage to get the car but could not get in, and in trying to enter the car through the trunk found a jimmy bar which fit the mark made at the scene of the break in. The trial court refused to suppress this evidence. The supreme court in remanding the case ruled that the trial court had erred and that the seizure was unlawful because no search warrant had been issued.[2]

B. *Indictment and information*

The supreme court in affirming the judgment of the lower court in a case involving the sale of intoxicating liquor without a license recognized the general tendency of getting away from common law technicalities and upheld the conviction under the information, even though the word "feloniously"

2. State v. Jones, 214 S.W. 2d 705 (Mo. 1948).

was omitted. The court ruled that "feloniously" and words of similar import are only necessary "when without the magic words the acts describe a misdemeanor rather than a felony as in many instances of felonious assault."[3]

In another case the court ruled that designating the fish and game statute as a "code" instead of an "act" was a defect in the information, but that the action of the defendant in failing to attack the information until after verdict waived the defect.[4]

In the case of *State v. Whipkey*[5] the defendant was charged under the habitual criminal act and the indictment failed to allege the date of the discharge of the defendant on the prior offense. The indictment did charge that he was discharged from the penitentiary upon lawful compliance with the sentence and the court ruled that it was not necessary to allege the date of such discharge in the indictment.

The court continued to show a tendency to get away from the old common law technical wording in indictments and informations in the case of *State v. Stringer*.[6] The court had before it a charge of infanticide, wherein the information failed to allege that the deceased "was given a mortal wound by the defendant," as would be required under the common law charge of manslaughter. The court's ruling was that the information was not defective because the defendant had been properly informed of the charge aainst her, finding that the defendant would not have obtained information of any substance by the additional allegation. The court held that the common law must be complied with as to substance, but that the ancient forms need not be followed where there is no prejudice to the rights of the accused.

In the case of *State v. Frisby*[7] the court had before it the sufficiency of an information charging the keeping of a gambling device. The charge involved a crap or dice table and the information described the table and the way it was used. The court ruled that this was a sufficient description of the gambling device. The court did say, however, that it is necessary where the statute does not specifically make the possession of the specific gambling device an offense, that it be described in the information sufficiently for the court and the defendant to know the nature of the accusation.

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3. State v. Updegraff, 214 S.W. 2d 22, 24 (Mo. 1948).
4. State v. Taylor, 214 S.W. 2d 34 (Mo. 1948).
5. 215 S.W. 2d 492 (Mo. 1948).
6. 357 Mo. 978, 211 S.W. 2d 925 (1948).
7. 214 S.W. 2d 552 (Mo. 1948).

C. *Extradition*

An unverified information from a sister state, even though such information was permitted under the law of the sister state, was held to be insufficient to permit extradition. The court found that it is necessary in order to honor an extradition request from another state that the requesting state furnish a copy of the indictment found or an affidavit made before a magistrate of the requesting state. The only substitution permitted for an indictment is an affidavit before the magistrate upon which the information is based, and an information is not sufficient even though the local state law does not require the verification of an information.[8]

II. Venue

The trial court in the case of *State v. Bird*,[9] after all the evidence was in and the defendant's attorney was arguing the motion for a directed verdict, suggested to the prosecuting attorney the reopening of the case in order to prove venue. This action of the trial court was complained of on appeal and the supreme court ruled that the court's action was proper in holding that the proof of the case had shown that the offense took place in the forum and that it was not only the court's right but the court's duty to follow the course taken.

III. Trial

A. *Voir dire*

In one case the defendant had challenged the prospective juror who stated that if he were convinced of the defendant's guilt he would not vote for anything but the death penalty. The record, however, showed that this particular juror did not sit on the jury but did not disclose whether the juror's name was stricken by the defendant or the state. The court held that there was no error preserved for review under these circumstances.[10] This particular case is important in the defense of criminal cases and indicates the value of a complete record, even showing the persons whose names were stricken and by what party.

There was only one other case involving the qualifications of a juror to sit in a case, and again the supreme court ruled that the conviction could not be reversed on the state of the record before the court. After the voir

8. State *ex rel.* Taylor v. Blair, 214 S.W. 2d 555 (Mo. 1948).
9. 214 S.W. 2d 38 (Mo. 1948).
10. State v. Battles, 357 Mo. 1223, 212 S.W. 2d 753 (1948).

dire examination and the challenges had been made and the twelve jurors accepted and sworn to try the case, one of the accepted jurors spoke up and stated that, having seen the prosecutrix in a rape case and knowing the family of the girl, he would like to be excused. The defense did not attempt to further question the juror, nor request that the juror be excused or indicate any dissatisfaction with the court's ruling that the juror should serve, and the supreme court ruled that under the record the trial court did not err in causing the juror to continue in the case.[11]

B. *Evidence*

Admissibility of evidence in criminal cases is oftentimes governed by a different rule than that ordinarily applied in civil actions. A great many of the questions which are raised on criminal appeals involve the admissibility of evidence and for that reason it is felt that such cases on evidence should be here reviewed.

1. Confessions and admissions

In *State v. Humphrey*[12] a unique question was presented as to whether or not an acquittal at a previous trial for burglary, wherein the defendant's confession had been introduced, was res judicata in a second trial as to the voluntariness of the confession. The court indicated that under a proper set of facts such would be the case. However, in the case at bar there was no instruction in the first case as to the issue of voluntariness and no showing of adjudication of that issue in the first trial.

In *State v. Battles*[13] the always perplexing problem of silence as an admission was before the court. The arresting officer at the trial was asked, "Did the defendant make any statement there?" and the officer's answer was that he had asked the defendant as to whether the defendant would lie still and the defendant had said yes, he would lie still, and that was the only statement made by the defendant. In this case the court held that the question and answer involved did not actually involve any admission by silence because there was nothing to indicate that the defendant was asked anything about the crime or that anything about the crime was stated in his presence. The court by way of dictum, however, made the following statement as to the silence of the accused:

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11. State v. Coones, 357 Mo. 1124, 212 S.W. 2d 429 (1948).
12. 357 Mo. 824, 210 S.W. 2d 1002 (1948).
13. 357 Mo. 1223, 212 S.W. 2d 753, 757 (1948).

> "The law in this state is that 'Silence of the accused when not under arrest, and in circumstances such that only a guilty person would have remained silent, may be shown. After arrest or while in custody the evidence is inadmissible because he is under no duty to speak."

In a kindred situation the court had before it a question of admission by conduct. In the case of *State v. Stringer*[14] the defendant after the death of her newly born child, which she was accused of having killed, failed to notify the coroner of the death of the child. The state contended in the trial court that this testimony was admissible, apparently on the theory that it was an admission by conduct. The trial court permitted the coroner to testify that he never did receive notice of the death of the child. The supreme court ruled that there is no duty on the general public, and particularly upon an accused, to report the death to the coroner. The court further ruled that the failure of the defendant to report the child's death to the coroner was not necessarily inconsistent with her innocence, and in a circumstantial evidence case did not have any probative value.

The court reaffirmed the well established principle that a confession or admission cannot be used to establish the corpus delicti and is not even admissible in evidence until the corpus delicti has been established.[15]

2. Proof of other crimes

In two different cases the supreme court permitted proof of other crimes in the case in which the defendant was then being tried. In both cases the proof of the other crime was incidental to and very directly connected with the offense with which the defendant was being charged. In one case the defendant was charged with robbery with a deadly weapon and during the course of the robbery committed an act of sodomy. The court ruled that the state was not required to separate this evidence and exclude the testimony as to the offense of sodomy where the act took place as a part of and in connection with the same offense, ruling that the act formed a part of the res gestae of the crime charged.[16] In the other case the defendant was charged with leaving the scene of an accident and on appeal complained of the fact that the state was permitted to introduce in evidence the fact that the persons struck by the automobile were fatally injured and died before

14. 357 Mo. 978, 211 S.W. 2d 925 (1948).
15. State v. Cooper, 214 S.W. 2d 19 (Mo. 1948).
16. State v. Gentry, 212 S.W. 2d 63 (Mo. 1948).

they could be taken to the hospital. The court, in overruling the defendant's contention, ruled that the facts of the fatality were so closely associated with the proof of the injury that such proof could hardly have been made without showing the fatal connection thereof, and that it was part of the offense of leaving the scene of an accident for the state to prove that there had been injury to a person or damage to property.[17]

3. Reputation of the victim

In one case the court had before it the admissibility of testimony as to the general reputation of the deceased as to turbulence or violence and reaffirmed the well established principle that where a plea of self-defense is interposed, evidence of the deceased's reputation for turbulence and violence is admissible.[18]

4. Prior threats

In the case of *State v. Whipkey*,[19] a murder prosecution, the state was permitted to prove that the defendant while in California some time before the offense had been committed, stated that he would kill the deceased if he found her with another man. The court permitted this evidence as proof of motive, even though remote.

5. Unavailability of witnesses

In one case the prosecuting witness testified at the preliminary hearing but died before the time of the trial. The record showed that the defendant was present at the preliminary hearing and accorded the right of examining all witnesses. The court, following a well established principle, ruled that the transcript of this witness' testimony was properly admissible in evidence.[20]

C. *Impeachment*

In two different cases the court again reaffirmed the rule that a defendant when a witness can be impeached by a proof of other crimes which he has committed and that the state can go so far as to prove, either by cross-examination or by the record, the offenses for which the defendant has been convicted and the number of times he has been convicted.[21]

D. *Instructions*

Instructions are always troublesome for both the litigants and the court, and in the field of criminal law we do not find any exception to this

17. State v. Harris, 357 Mo. 1119, 212 S.W. 2d 426 (1948).
18. State v. Parker, 214 S.W. 2d 25 (Mo. 1948).
19. 215 S.W. 2d 492 (Mo. 1948).
20. State v. Parrish, 214 S.W. 2d 558 (Mo. 1948).
21. State v. Gentry, 212 S.W. 2d 63 (Mo. 1948); State v. Parrish, 214 S.W. 2d 558 (Mo. 1948).

principle. In the case of *State v. Whipkey*[22] the supreme court reversed and remanded the cause on an instruction by the trial court on the credibility of witnesses. The court had instructed that "if you believe that any witness has knowingly and wilfully swore falsely to any material fact, *you should reject all or any portion of such witness' testimony.*" (Emphasis the writer's.) The court held that the emphasized portion of the instruction was erroneous and that the word "may" should have been used instead of the word "should" in the instruction. The court ruled "It is within the province of the jury and not the court to determine whether any or all of a witness' evidence is to be believed."

In several different cases the question of the necessity of instructions on a certain issue was before the court. It is, of course, well established that the court, whether requested or not, must instruct on all issues of the case in a criminal action and, of necessity, the instructions which must be given are dependent upon the facts and circumstances of each case. In one case the defendant had raised the defense of accident in a murder charge. The court ruled that the lower court must instruct on this particular issue.[23] In the same case the trial court was found to have erred in assuming in an instruction that the defendant shot and killed the deceased where the evidence on the part of the defendant was that he and the deceased were scuffling for the possession of the gun at the time of its discharge. In another case the court ruled that a common assault instruction should have been given in a case in which the defendant was charged with rape,[24] and in another case on a different set of facts the court ruled that it was not necessary in a charge of assault with intent to kill to instruct on common assault because the facts did not justify submission of the charge on any offense other than either assault with intent to kill, which is a felonious assault, or self-defense.[25] In another case the court ruled that a manslaughter instruction was not justified under the circumstances, holding that under the particular facts of the case there was a sufficient cooling off period so as to remove the question of manslaughter.[26]

In connection with preserving alleged errors in instructions, it is important to note that the motion for new trial must specifically point out the

22. 215 S.W. 2d 492, 494 (Mo. 1948).
23. State v. O'Kelly, 213 S.W. 2d 963 (Mo. 1948).
24. State v. Famber, 214 S.W. 2d 40 (Mo. 1948).
25. State v. Parrish, 214 S.W. 2d 558 (Mo. 1948).
26. State v. Parker, 214 S.W. 2d 25 (Mo. 1948).

portion of the instruction complained of, and that in the absence of such specification of error nothing is preserved on appeal.[27]

E. *Verdict*

In two different cases the jury failed to state that the confinement should be "in the penitentiary." The supreme court in both cases held that this was not a sufficient error to justify reversal of the cases.[28]

IV. Specific Offenses

In the case of *State v. Harris*,[29] defendant was charged with leaving the scene of an accident. One of the defenses interposed was that the defendant an hour and a half later, after having gone home and told his wife about it, went to the police department and reported the accident. The court ruled that where the motorist knew that he had struck a pedestrian and drove on without stopping and giving the information required by statute he was guilty even under the circumstances herein set forth. In the same case the court had before it an instruction in which complaint was made of the use of the word "immediately" in the main instruction, whereby it was hypothesized that if the motorist, immediately after striking a person, left the place of injury without stopping and giving the necessary information, the jury should return a verdict of guilty. The defendant contended that the information should have been given within a reasonable time, rather than immediately, but the defendant's objection was overruled.

Sections 4408 and 4409, Mo. Rev. Stat. (1939), which define two types of felonious assault, have always been troublesome. These two sections were before the court in the case of *State v. Hacker*.[30] The defendant was charged with assault with intent to kill with malice with a deadly weapon, and the defendant was convicted of assault with intent to kill without malice. The charge was laid under Section 4408 and the conviction was under Section 4409. The contention was made that the weapon used was not a deadly weapon. The court found that under the circumstances the whiskey bottle which was used was a deadly weapon, this in view of the fact that the temple artery had been severed and bled profusely, and the medical testimony was that an uncontrolled bleeding in this manner could have caused death.

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27. State v. Tolson, 215 S.W. 2d 438 (Mo. 1948).
28. State v. Famber, 214 S.W. 2d 40 (Mo. 1948); State v. Parrish, 214 S.W. 2d 558 (Mo. 1948).
29. 357 Mo. 1119, 212 S.W. 2d 426 (1948).
30. 214 S.W. 2d 413 (Mo. 1948).

For those who enjoy their leisure time with a fishing rod, the supreme court has ruled that the dynamiting of fish in a pond which is privately owned is a violation of the law, in spite of the contention by the defendant that title to the fish has been relinquished by the state to the private owner. The court found that the defendant, who was a trespasser who dynamited and killed fish in a private pond stocked solely by private parties and which was not connected in any way with water of the state, could still be convicted under the statute prohibiting placing explosives in the waters of the state. The court ruled that the regulatory powers of the state in this connection would extend to such a pond.[31]

V. Second Offenders

There have been more and more cases each year where the court has been called upon to construe the so-called habitual criminal statute.[32] In one case the court reaffirmed its prior position that a conviction, sentence and discharge for a graded felony, even though the punishment be no more than a jail sentence, subjects the second offender to the provisions of the habitual criminal act.[33] Also a sentence to the intermediate reformatory at Algoa and a discharge from the sentence makes the offender amenable to the act.[34] In the latter case the court again ruled that where the defendant admits the prior convictions it is not necessary to instruct the jury in the alternative as to a finding of guilt and sentence under the habitual criminal section and as to the punishment without the application of the habitual criminal act.

EVIDENCE

Jackson A. Wright*

During 1948, the Supreme Court of Missouri in twenty-four cases passed upon or discussed questions of evidence which are deemed worthy of note. Most of the decisions, however, are in accordance with well established rules.

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31. State v. Taylor, 214 S.W. 2d 34 (Mo. 1948).
32. Mo. Rev. Stat. §§ 4854, 4855 (1939).
33. State v. Updegraff, 214 S.W. 2d 22 (Mo. 1948), see Comment, 14 Mo. L. Rev. 172 (1949).
34. State v. Hacker, 214 S.W. 2d 413 (Mo. 1948).

*Attorney, Mexico. B.S., University of Missouri, 1940, LL.B., 1944.

Judicial Notice

The supreme court took judicial notice of certain facts within the common knowledge of people in a number of cases. In *Nemours v. Hickey*,[1] the court took judicial knowledge of the fact that parking on public streets in cities is commonly limited or forbidden at places where traffic needs make it advisable. Likewise, they took judicial notice that standard gauge railroad tracks are 4 feet 8½ inches apart, and that locomotives are wider than the tracks, in *Taylor v. Missouri K. & T. R. R.*[2] However, the court refused to take judicial knowledge as to how much locomotives are wider than the tracks.

In *Bindley v. Metropolitan Life Ins. Co.*,[3] the supreme court held that it could not take judicial notice of the rules of the circuit court. In this instance, the action had been dismissed under the Kansas City Circuit Court rules for failure to prosecute. It is interesting to note, however, that the court considered the rule, without taking judicial notice of it, since it was set forth in the briefs and had been treated by the parties to be in full force and effect. This should bring to our attention that local rules of circuit courts, where applicable in cases, should be introduced in evidence or agreed upon in the record by the parties.

In *State* ex rel. *Thompson v. Cave*,[4] judicial notice was taken of the fact that lights on automobiles are ordinarily set about three feet above the ground.

In *Kansas City v. Reed*,[5] the court took judicial notice of an original quo warranto proceeding pending before it between the same parties on the same set of facts.

Relevancy, Materiality and Competency

(a) *Competency in General*

In a condemnation proceeding reviewed in *Kansas City v. Thompson*,[6] the supreme court again held that evidence of purchase by the condemnor of other property is not competent on the question of value and damages in a condemnation proceeding. They held, however, that testimony of only one

1. 357 Mo. 731, 210 S.W. 2d 94 (1948).
2. 357 Mo. 1086, 212 S.W. 2d 412 (1948).
3. 213 S.W. 2d 387 (Mo. 1948).
4. 215 S.W. 2d 435 (Mo. 1948).
5. 216 S.W. 2d 514 (Mo. 1948).
6. 208 S.W. 2d 216 (Mo. 1948).

expert as to value would constitute substantial evidence to sustain a verdict and could not be rejected or disregarded.

In *State v. Walker*,[7] a prosecution for statutory rape of a female of previously chaste character between the age of sixteen and eighteen years, the prosecution introduced evidence of a promise to marry made by the defendant subsequent to the alleged act and on the same evening. This was alleged to be error by the defendant, but the court held that the general rule "is that acts, conduct, and declarations of the accused occurring after the commission of an alleged offense which are relevant and tend to show a consciousness of guilt, or a desire or disposition to conceal the crime, are admissible in evidence."

In the same case, the court held properly excluded evidence which only tended to corroborate the witness on an immaterial issue.

Rone v. Ward[8] was an action to set aside certain deeds on the grounds of forgery and failure of delivery. The grantor in the deeds was dead at the time of the trial. The plaintiff introduced the deeds, relying upon the presumption of delivery, and on cross examination the defendant's attorney developed from one of the plaintiff's witnesses that the deed had been delivered by the deceased grantor. This witness was one of the grantees in the deed, and the defendant objected to the evidence on appeal on the ground that it was incompetent, and that the witness could not testify thereto. The court overruled the objection on the grounds that the evidence had been brought out by the defendant on cross examination, and that there was no timely objection or request to strike made. The fact that the other party to the deed was dead had been waived by such procedure. Likewise, the memorandum of a lawyer regarding the delivery was hearsay and incompetent to show non-delivery when it was shown that the lawyer could not identify the source of his information.

In *Lance v. Van Winkle*,[9] the court discusses the question of evidence of experiments made outside of the court. Such experiments are admissible if it is shown that they were conducted under conditions substantially similar to those existing at the time of the occurrence in question. In the absence of such a showing, however, the evidence of the experiments should be rejected as incompetent.

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7. 357 Mo. 394, 208 S.W. 2d 233 (1948).
8. 357 Mo. 1010, 212 S.W. 2d 404 (1948).
9. 213 S.W. 2d 401 (Mo. 1948).

(b) *Cross Examination*

In *State v. Walker*,[10] the question of cross examination was presented. As mentioned above, this was a prosecution for statutory rape. In the course of the trial, one of the witnesses for the defense failed to give evidence expected of him, but did not testify favorably to the prosecution. The court held that the trial court correctly refused to allow the defense to prove what the witness had told the defendant's attorney prior to the trial. In discussing the rule for cross examination of a party's own witness, the court stated: "The evidence given by the witness at the trial was not of such an affirmative character as to be favorable to the adverse party, nor was it sufficient to make the witness, in effect, a witness for the state and to thereby authorize proof of previous inconsistent and contradictory statements." The court quoted from *State v. Drummins*,[11] "We held in the case of State v. Bowen, 263 Mo. (279), loc. cit. 280, 172 S.W. 367, that it is not sufficient to warrant a party who puts a witness on the stand, in impeaching such witness (by showing extrajudicial statements contradictory of the testimony of the witness upon the stand), that the witness merely fails or refuses to tell the facts which he had heretofore related extrajudicially or fails to tell all such facts, but, in order to warrant impeachment in the mode stated, the witness must go further, and by relating wholly contradictory facts become in effect a witness for the adverse side. In the latter event, the party calling the witness is entitled to show that he was misled and entrapped by the witness' former words and attitude into calling the adverse witness. He is not so entitled; however, when the witness merely fails to relate facts which the party offering him had been led to believe he would relate."

In *State v. Gentry*,[12] the supreme court set forth the rule regarding cross examination of a defendant in a criminal prosecution with regard to his previous record. It was held that it is proper to cross examine such a defendant upon (1) whether he has been convicted of a crime, (2) how many times he has been convicted, and (3) of what crime he has been convicted. Such is not prejudicial, and may be asked for the purpose of testing his credibility, since Section 1916, Mo. Rev. Stat. Ann. (1939), allows such testimony to be used to impeach such witness' testimony.[13]

10. 357 Mo. 394, 208 S.W. 2d 233 (1948).
11. 274 Mo. 632, 204 S.W. 271 (1918).
12. 212 S.W. 2d 63 (Mo. 1948).
13. See also Mo. Rev. Stat. Ann. § 4081 (1939).

(c) *Reputation and Character*

In the statutory rape prosecution, *State v. Walker*,[14] the court held that the question of character and reputation were not synonymous, but that reputation is some evidence from which character may be inferred, and therefore evidence of reputation is material and admissible.

ADMISSIONS AND CONFESSIONS

In *State v. Hutsel*,[15] which was a prosecution for murder, a written confession of the defendant and testimony at an inquest were held properly admitted against the defendant. The court noted that at the inquest the accused had been advised of his rights, and that his testimony at such inquest is admissible not as a judicial admission, but upon the theory that it is a voluntary admission against him. There was conflicting testimony in the trial with regard to the written confession. This testimony was heard outside the hearing of the jury by the trial judge, and later before the jury, and a determination made against its being involuntary, both by the trial judge and by the jury under the proper instruction. However, in *Hall Motor Freight v. Montgomery*,[16] evidence was refused that a defendant in a civil action, arising from an auto-truck collision, refused to testify in a reckless and careless charge in a justice of the peace court, relying on his constitutional rights. The court held that it could not be commented upon or shown in the civil case. In so holding, the court stated that he was within his rights in refusing to testify; and that showing this refusal was not competent to impeach him or to discredit his testimony, since to so allow it to be used would grossly impair the value of the constitutional right.

PRIVILEGE

It is interesting to note that only one case dealing with privilege was presented to the court during 1948. In *Hemminghaus v. Ferguson*,[17] the defendant in his argument to the jury commented on the fact that the plaintiff's family physician had not been called as a witness by the plaintiff, and that the defendant could not call him due to the confidential relationship existing between the physician and the plaintiff. The counsel for the plaintiff objected on the grounds that the defendant could have called him; and

14. 357 Mo. 394, 208 S.W. 2d 233 (1948).
15. 357 Mo. 386, 208 S.W. 2d 227 (1948).
16. 357 Mo. 1188, 212 S.W. 2d 748 (1948).
17. 215 S.W. 2d 481 (Mo. 1948).

that the plaintiff by introducing other testimony and by bringing the suit for damages, had waived the confidential privilege between the plaintiff and his family physician. The court held that by bringing the damage suit, the plaintiff did not waive the privilege of confidential communication to such family physician, since it was shown that the physician in question had not been consulted for some time prior to the injury in question, nor during nor since the injury. The court discussed fully privilege and what action waives such privilege. However, it did hold that testimony regarding treatment by a physician, which is brought out on cross examination, does not waive the privilege, since it was not voluntarily given. Nevertheless, the court states that the plaintiff was not relieved of the unfavorable inference of not calling the personal physician, and that the defendant could comment thereon.

Presumptions and Inferences

The well established rule of failure to testify raising an inference against the party was again brought out in *Weir v. Baker.*[18] This was a suit to set aside a conveyance as a fraud upon the creditors. In the course of the trial, there was testimony by the grantee in the conveyance to the effect that the grantor held title as a straw party for the grantee. The grantor, who was also a defendant in the action, did not take the stand. Commenting thereon, the court stated: "We have held in a similar case that the failure of defendants to testify as to facts well within their knowledge which, unexplained, amount to badges of fraud or suspicious circumstances, may be regarded as corroboration of such inferences as would naturally flow from such suspicious circumstances. McDonald v. Rumer, 320 Mo. 605, 8 S.W. 2d 592." This is in accord with the holding mentioned in *Hemminghaus v. Ferguson, supra.*

Parol Evidence Rule

In two cases, *Frey v. Onstott,*[19] and *Allaben v. Shelbourne,*[20] the court held that the recited consideration of One Dollar in a deed may be questioned, and parol evidence admitted to show the actual consideration. In the *Frey* case the court pointed out that the recited consideration cannot be attacked to determine sufficiency of consideration to make the deed a valid conveyance, but may be questioned to determine whether or not fraud exists. In the *Allaben* case, the court again states that outside evidence can

18. 357 Mo. 507, 209 S.W. 2d 253 (1948).
19. 357 Mo. 721, 210 S.W. 2d 87 (1948).
20. 357 Mo. 1205, 212 S.W. 2d 719 (1948).

be introduced to show whether or not a valuable consideration was given for the purpose of establishing whether or not the grantee in such deed is a bona fide purchaser for value.

Expert and Opinion Evidence

There were a number of cases concerning the use of expert testimony decided by the supreme court. In *State v. Miller,*[21] the qualifications of an expert were examined and under the facts as shown, a chemist for the highway patrol was held to be an expert for the purpose of testifying that the scrapings from shoes and particles adhering to a chisel were similar to the mortar debris found under the hole in a wall of a burglarized warehouse. In *Hamre v. Conger,*[22] the court held that highway patrolmen could not give their opinion in testifying as to the point of an impact from the location of debris. The court stated that this was not a proper subject for expert testimony, and that the patrolman could only testify as to the location of such debris, which then could be used by the jury in determination of the exact point of collision. The court cites *Baker v. Kansas City Public Service Co.,*[23] for a definition of expert testimony, and says, "Whatever value the location of the debris or the center of the debris falling from two motor vehicles upon impact may have upon determining the point of impact is not, in our opinion, a proper subject for expert or opinion evidence. In this age of motor vehicles, knowledge upon such subject is not something not possessed by the ordinary person, hence the opinion evidence of Patrolman Harrison was incompetent, since it invaded the province of the jury."

In further considering the proper use of opinion evidence by experts, however, the court held in *Metropolitan Ice Cream Co. v. Union Mutual Fire Ins. Co.,*[24] that a case involving the collapse of a tower was a valid occasion for the use of expert testimony, stating that the court is unable to say that the opinion of experts on such a subject would not be of value to the jury.

In *State* ex rel. *Spears v. McCullen,*[25] the court held that it has long been the rule that an owner of an automobile, without further qualification, may testify as to its reasonable value. This is not on the theory that he is an expert, but that he is nevertheless qualified to so testify, and the jury should determine the weight and value of his testimony.

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21. 357 Mo. 353, 208 S.W. 2d 194 (1948).
22. 357 Mo. 497, 209 S.W. 2d 242, 248 (1948).
23. 353 Mo. 625, 183 S.W. 2d 873, 875 (1944).
24. 216 S.W. 2d 464 (Mo. 1949).
25. 357 Mo. 686, 210 S.W. 2d 68 (1948).

In *Kennedy v. Union Electric Co. of Missouri*,[26] which was an action for flooding a farm alleged to be due to construction of a dam, error was alleged in allowing farmers, who had had much practical experience in observing floods and flooding, but who were not experts, to testify to their opinion as to the cause of the flooding. The court held that nonexperts can testify as to their opinion when it is impossible or impracticable to place before the jury all of the primary or necessary facts so that the jury can make an intelligent decision. A true test was stated to be: "Does the jury need any inferences from the witness because his observed data cannot be adequately reproduced by him?" The court, however, points out that the witness must show sufficient facts and circumstances to amount to substantial evidence in support of his opinion. Likewise, in such situations, these witnesses are not qualified to testify to hypothetical situations, but only to testify to situations observed by them.

Hearsay

In *Snider v. Wimberly*,[27] which was an action for damages for false arrest, the evidence included admission of a police report made by a police officer and found in the police files. This report was objected to by the defendant on the grounds that it was hearsay. The court held that while the general rule is, "There is a well-established exception to the hearsay rule admitting official reports made by an officer on the basis of his own personal investigation and knowledge, at least when required by statute, ordinance, rule or regulation," there was no showing in this particular case that the report was required by rules of the police department. In *Caldwell v. Anderson*,[28] testimony as to a threat of a secondary boycott by a chauffeur's union unless the company discontinued supplying building materials for the plaintiff's construction project was hearsay and inadmissible for the purpose of proving conspiracy in restraint of trade by officers and agents of the building and construction trade council, in the absence of evidence that the person who allegedly made the threat had authority to speak for the union.

Steffen v. Ritter,[29] was an action for damages for death of the plaintiff's husband. In an effort to show how the accident occurred, the plaintiff offered a statement of the deceased made two days after the accident to the plaintiff while the deceased was in the hospital. This was excluded on the

26. 216 S.W. 2d 756 (Mo. 1948).
27. 357 Mo. 491, 209 S.W. 2d 239, 241 (1948).
28. 357 Mo. 1199, 212 S.W. 2d 784 (1948).
29. 214 S.W. 2d 28 (Mo. 1948).

ground that it was hearsay and that there was not sufficient showing of spontaneity to make it a part of the res gestae. The plaintiff did not introduce in evidence the hospital record, and the only evidence to support a showing of res gestae was the testimony by the wife that the deceased was conscious for the first time to her knowledge when he made the statement about the accident. Other evidence showed that the wife had seen the deceased only at intervals during the two day period, and this was not considered sufficient to prove the fact of continuance of unconsciousness for the entire period.

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.*

The term "humanitarian doctrine" has been loosely used by the Bench and Bar to comprehend the common law last clear chance rule as well as the unique Missouri rule that a negligently inattentive plaintiff may recover damages for personal injuries from a negligently inattentive defendant under circumstances where either might, in the exercise of care, have discovered the peril or risk of injury in time, by the exercise of care to have avoided the injury. Since it seems inevitable that the Missouri Supreme Court will be confronted with the necessity of reexamining the nature, extent and future application of the humanitarian rule, it seems appropriate to review the current cases by separating the cases involving the last clear chance rule from those involving the humanitarian rule.

And since the decisions of the supreme court in 1948 indicate that the court, as a whole, is not satisfied with the use and treatment of the humanitarian rule, and may do something about it, a definition of the humanitarian rule by certain hypothetical cases seems in order. There is nothing new in such a definition, but reiteration may be necessary to aid in the proper use of the "humanitarian doctrine." Of course the fact combinations are so varied that a statement of all the possible hypothetical cases would be unending.

Four principal hypothetical cases can be stated nevertheless. They are as follows:

> *Case 1.* The peril to plaintiff's person, property, or both results from physical helplessness caused by plaintiff's lack of care. Defendant actually discovers the peril in time, thereafter, with safe-

*Attorney, Columbia. LL.B., University of Missouri, 1932.

ty to himself, to avoid damage to plaintiff by the exercise of care. This is a simple last clear chance case. The plaintiff may recover for personal injury and property damage despite his negligence in practically all common law jurisdictions. This result is well settled in Missouri and not expected to be challenged; but this is *not* a humanitarian negligence case.

Case 2. The facts are the same as in *Case 1*, except that the defendant does not actually discover the peril, but in the exercise of care he should have discovered it in time to avoid damage, by the exercise of care and with safety to himself. As in *Case 1*, a majority of courts permit plaintiff to recover for personal injury or property damage under the last clear chance rule. This is not a humanitarian negligence case, and the rule is not expected to be challenged.

Case 3. The peril to plaintiff's person, property or both, results from plaintiff's negligent inattentiveness (obliviousness in Missouri judicial parlance). Defendant (as in *Case 1*) actually discovers the peril, in time, thereafter to avoid damage to plaintiff by the exercise of care. This is a last clear chance case. It is not a humanitarian case. The rule that plaintiff may recover seems settled in Missouri and elsewhere.

Case 4. This case is a true humanitarian case. As in *Case 3* the peril to plaintiff's person, property or both results from plaintiff's negligent inattentiveness (obliviousness). But defendant does not actually discover the peril of plaintiff. Nevertheless, the defendant in the exercise of care should have discovered the peril in time thereafter with safety to himself, by the use of care to avoid damage to plaintiff. Missouri seems practically alone in permitting plaintiff to recover in this case.

It is the holding in *Case 4* which is under attack in Missouri, and which is causing so much difficulty in judicial administration. With the general use of the automobile the doctrine has become logically embarrassing. These questions among others are arising:

> Both plaintiff and defendant are injured personally, and each can make a submissible case against the other under the humanitarian rule. May each recover damages against the other simultaneously? (Some members of the bar believe this to be the rule.) Or does the first to file a claim have the right to recover, while the last to file does not? (Some members of the bar are under this impression.) Does the rule apply to permit recovery of property damage? (It frequently is so used; particularly where the plaintiff sustains personal and property damage.) Can humanitarian negligence of plaintiff be used to defeat plaintiff's recovery (a) if defendant is personally injured as a result; (b) if defendant is not so injured?

In *Crews v. Kansas City Public Service Co.*,[1] Judge Hyde (then Commissioner) commented upon the difficulties which had arisen from application of the humanitarian rule to automobile traffic problems. He described the problem as "the new strain placed upon the fair and just operation of our humanitarian doctrine by modern fast-moving motor traffic. . . ." The "strain" has not been decreased as time passes. Again one of the judges, and significantly a newer one, Judge Conkling, took occasion to state, concerning the humanitarian doctrine, that "the case made law of Missouri has widely extended the rule, far beyond its original concept."[2]

This follows the earlier significant statement in an opinion by Judge Ellison that "the whole humanitarian doctrine is case law." Such expressions seem to imply that the court which devised the doctrine has the right and the duty to revise or restate it when necessary or desirable. And since revision or restatement is so obviously desirable, if the court is to avoid untold embarrassment, the Bar should give some serious work and thought to aid the court in solving the problem.

In 1948 no decision presented to the court the necessity of immediate reexamination and restatement of the rule. But it was clear at the close of 1948 that any day might bring before the court one of the cases where two persons seek simultaneous recovery, each against the other, under the humanitarian doctrine; or where negligence under the humanitarian doctrine is asserted as a defense to a claim under the humanitarian doctrine.

Most of the authorities and current discussions of the problem can be found in Dean McCleary's "The Bases of The Humanitarian Doctrine Reexamined," 5 *Mo. Law Review* 56; the annotation in 92 A.L.R. 47; *Restatement of Torts*, §§ 479-480, and Mo. Annotations, §§ 479-480.

In 1948 the decisions involving last clear chance or humanitarian rule cases were relatively numerous. They indicate a definite trend toward restricting the operation of the humanitarian doctrine. In one case[3] the court *en banc* indirectly, but expressly, overruled a former holding that the humanitarian doctrine would permit recovery when a vehicle at rest moves forward a short distance and strikes the plaintiff. In other cases, the rule was not applied with its usual liberality. Upon one point or another, case after case submitted in the trial court under the humanitarian doctrine was found to be wanting in some element necessary for recovery. In following

1. 341 Mo. 1090, 111 S.W. 2d 54, loc. cit. 58 (1937).
2. Smith v. Siedhoff, 209 S.W. 2d 233, loc. cit. 236 (Mo. 1948).
3. Smith v. Siedhoff, 209 S.W. 2d 233 (Mo. 1948).

this trend, the court did not distinguish between conventional last clear chance cases and the humanitarian cases.

Many observers believe it would be better to have a restatement of the scope of the humanitarian doctrine than to have a case to case change.

It is generally conceded that there is a strong feeling against the harsh common law rule of contributory negligence. And to the limits that logic, reason, and judicial craftsmanship will permit, Missouri will welcome any sound formula or doctrine which will ameliorate the operation of this common law doctrine where the plaintiff's injury was avoidable by the defendant notwithstanding the plaintiff's contributory negligence. Perhaps the simplest solution of the problem would be legislative enactment of the doctrine of comparative negligence, proportional fault, or by a statute making contributory negligence considerable only in mitigation of damages. In any event, some workable logical solution must be found.

En Banc

Smith v. Siedhoff[4] involved a situation wherein plaintiff was injured when defendant's truck struck some steel beams plaintiff was engaged in unloading from a coal car standing on a switch track at Front and Jefferson Streets in Washington, Missouri. The case was submitted under the humanitarian doctrine on four alternatives of humanitarian negligence disjunctively; namely, failure to (1) stop, (2) reduce speed, (3) swerve, and (4) warn by use of automobile horn. In addition the case was submitted on primary negligence. The fact situation is decidedly uncommon if not unique.

The two motor vehicles involved were moving on courses intersecting at a right angle. Plaintiff was a pedestrian walking behind one vehicle steadying a bundle of long steel beams, being suspended and towed slowly behind the vehicle which was moving laterally across the street on which defendant's vehicle was traveling. Plaintiff as he followed the towing truck, behind and to the side with a hand on one end of the suspended bundle of beams, was oblivious to his danger though able to avoid it. The defendant was fully aware of the relative position and speed of the plaintiff and the vehicles. Defendant misjudged the situation first, then drove forward and struck the bundle of beams thereby injuring the plaintiff. The court held the case to be submissible, upon primary negligence. But because defendant's driver

4. *Ibid.*

stopped a few feet from the point of impact and then moved forward a few feet, the court held that no humanitarian or last clear chance case was made upon any ground.

This was not really a humanitarian case. The defendant driver was not oblivious to plaintiff's situation and, if anything, a last clear chance case (of *Case 3* above) was presented. Nevertheless the case is significant in the administration of the humanitarian rule, (1) for its oblique holding that last clear chance or humanitarian negligence does not arise when a vehicle at rest moves forward a short distance and strikes a plaintiff (*Took v. Wells*[5] was, on the point, overruled); and (2) for its significant statement that:

> "Even so much as a birds-eye view of the personal injury litigation in the state for the past three or four decades would demonstrate how widely the humanitarian rule has been sought to be invoked and applied to varying states of fact. The case made law of Missouri has widely extended the rule, far beyond its original concept. But not every state of facts resulting in injuries from moving objects gives rise to such a cause of action."

This is not the first time the court has recently called attention to the fact that the humanitarian rule is "case made law" or "judge made" law. The implication seems to be clear that what law is made by cases may be unmade or revised by them.

In the case of *Smith v. Siedhoff,* under discussion, the lesson is clear to the practitioner. It indicates the folly of invoking the humanitarian or last clear chance rule in a case clearly submissible upon substantial grounds of primary negligence, not affected by contributory negligence as a matter of law.

Blaser v. Coleman[6] involved a unique fact situation wherein the plaintiff who had been riding in the bed of a heavily loaded truck leaped from the truck and injured himself when the truck was abandoned by the driver on a steep incline. The truck was traveling up an incline, when the axle broke. After the breaking of the axle, the truck coasted upward and forward about ten feet, stopped momentarily, and then started rolling back down the grade. The truck could have been stopped by application of the foot brakes which operated independently of the axle. By use of the hand brake the speed of the truck could have been slackened and the truck brought under control and to a stop safely at the foot of the grade. The case was submitted on

5. 331 Mo. 249, 53 S.W. 2d 389 (1932).
6. 213 S.W. 2d 420 (Mo. 1948).

the humanitarian or last clear chance doctrine. In an opinion by Judge Douglas, the court *en banc* reached a result surprising to some, that the plaintiff was not in imminent peril until the driver had left his post and jumped from the cab; that thereafter, being out of the cab, the driver could do nothing to avoid plaintiff's injury. Some, including the defendant truck driver, felt that the imminent peril arose before the driver abandoned the truck. It seems that a last clear chance case was clearly made. The case does not really involve the humanitarian doctrine. It is a case where the plaintiff was physically helpless. The question decided by the court was when the peril arose. The facts showed, to the satisfaction of the driver at least, that there was considerable peril at the time he made up his mind to abandon the truck with the plaintiff standing helplessly in the bed thereof. In the view of some, this case is in conflict with the holding of the court in *Bobos v. Krey Packing Co.*[7] However, the *Bobos* case was not overruled and may still have some validity. Having been of counsel the author of this article may be prejudicial in this appraisal of the case.

Yeaman v. Storms[8] involved a collision of two motor vehicles at the intersection of a major and a minor street on a clear day. As plaintiff drove his motor vehicle within ten feet of the intersection, he saw the defendant's automobile approaching the intersection about two hundred feet away at a speed of thirty to thirty-five miles per hour. Plaintiff, moving not over ten miles per hour, could have stopped his vehicle within ten feet but never did apply his brakes. He stepped on the accelerator and attempted to get across ahead of the defendant, thinking he had plenty of time to get out of the way and that defendant would slow down to permit him to pass. The plaintiff was not oblivious to the approach of the defendant's automobile and of his peril. The case was submitted solely under the humanitarian doctrine. The question of failure to warn was not involved, because the plaintiff was admittedly not oblivious to the approach of defendant's automobile. In an opinion written by Judge Conkling and concurred in by all of the sitting members of the court, it was held that no submissible case was made; that the plaintiff (not being oblivious) was not in a situation of imminent peril until he was so close to the path of the defendant's car he could not stop short of that path. By calculations based upon relative speeds of the motor vehicles involved, the court found that the situation of imminent peril existed

7. 317 Mo. 108, 296 S.W. 157 (1927).
8. 217 S.W. 2d 495 (Mo. 1949).

only one second or less before the impact. Upon that showing and taking into consideration reaction time of the defendant, it was held that no case was made.

This case is a true last clear chance case and not a humanitarian case. The plaintiff was not inattentive or oblivious. In determining the soundness of the opinion, the only question to be decided is the question of soundness of the court's appraisal of the time and distance situation.

This case has been the subject of recent comment. The decision seems to be sound and not out of line with the earlier cases. The same conclusion has been reached in a current comment.[9]

Steuernagel v. St. Louis Public Service Co.[10] was a suit by an automobile guest arising out of an automobile-streetcar collision. After coming off a private right of way onto a public highway while the automobile and the streetcar were moving in the same direction, the streetcar struck the automobile in the rear. The highway consisted of four traffic lanes with the car tracks running in the north lane after entering the highway. The automobile could have been driven in a clear lane south of the car tracks on the highway. In passing on the submissibility of the case, the court concentrated on the question of when "imminent peril" arose and whether the evidence showed ability of the defendant to avoid the collision after "imminent peril" arose.

This is an unusual case of one moving vehicle *overtaking* and striking another vehicle, complicated by the fact that the overtaking vehicle moved on a fixed curved path into the path of the vehicle overtaken. The court ruled that (1) no submissible case was made; (2) the peril arose only when it appeared that the automobile was going to be driven upon the tracks in the highway in front of the approaching streetcar at a slower speed than that of the streetcar; and (3) "there is absolutely no evidence of the time that must be allowed for the motorman to have comprehended the danger, for his muscles to have responded to his will, for the brakes to have taken hold and for the speed of the streetcar to have been reduced to such a degree as would have prevented it from overtaking the automobile moving ahead of it at a speed of 18 or 20 miles per hour." The case is a humanitarian case similar to *Case 4* above. In the alternative it was considered a last clear chance case similar to *Case 3* above.

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9. 17 KAN. CITY L. REV. 152 (1949).
10. 357 Mo. 904, 211 S.W. 2d 696 (1948).

The case is notable on recognition of the question of reaction time and time factor in *muscular response*. It excepts from its ruling "almost escaping" cases like *Gann v. Chicago, R. I. & P. Ry.*[11]

The very interesting, perplexing, and much litigated case of *Knorp v. Thompson*[12] involved a train-automobile collision at a grade crossing. The plaintiff's intestate, killed in the collision, was probably contributorily negligent as a matter of law. The case was submitted upon humanitarian negligence in failing to warn. Specifically, the plaintiff based the case upon failure of the trainmen to sound "emergency or short blasts" of the whistle after notice of the deceased's peril. The statutory crossing warning was timely commenced and was continued and was being sounded up to the time the train passed over the crossing.

While the case could have been resolved against the plaintiff for other reasons,[13] the court chose to reexamine and overrule the old cases requiring the trainmen to give short emergency blasts, as distinguished from the statutory whistle crossing signal (Section 5213, Mo. Rev. Stat., 1939), upon discovery of deceased's peril. Judge Ellison dissented in an opinion which seems convincing of its logical and practical soundness on the question of acoustics involved.

This case of an apparently oblivious injured party and an aware defendant is not a true humanitarian case. It is a true last clear chance case, similar to *Case 3* above.

Graham v. Thompson[14] was a case brought under the Federal Employers' Liability Act. A switchman standing between two tracks was run down and killed by a train, to the approach of which he was apparently oblivious. The plaintiff submitted her case upon the failure to warn after deceased's "discovered and not his discoverable peril." While the case is interesting and produced a divided court upon the several questions of master-servant law, it is a plain last clear chance case (*Case 3*) and really does not involve the humanitarian doctrine though the terminology is used.

Division Number One

In *Taylor v. Missouri, K. & T. Ry.*,[15] the plaintiff's intestate was an elderly pedestrian who was killed as he walked into the path of a locomotive

11. 319 Mo. 214, 6 S.W. 2d 39 (1928).
12. 357 Mo. 1062, 212 S.W. 2d 584 (1948).
13. See Comment, 11 Mo. L. Rev. 362 (1946).
14. 357 Mo. 1133, 212 S.W. 2d 770 (1948).

and train of cars at a grade crossing at a public street in Boonville. The only surviving eyewitnesses were the fireman and engineer. The evidence most favorable to plaintiff indicated that the fireman and engineer acted promptly *first* to sound emergency warning blasts (deceased was deaf though this was not known at the time) and thereafter to stop and slacken by use of the emergency brake. The plaintiff relied for submissibility of his case upon a fragment of testimony of the engineer that he could have slackened the speed of the train "very little" upon being told by the fireman that a man was coming on the track. The court held that this was not sufficient and was basing a case upon conjecture, in the absence of evidence of reaction time and opinion evidence showing that the train could have been slackened sufficiently to have permitted the deceased to escape.

The deceased was not visible to the engineer as he moved toward the track. The fireman (being unaware of deceased's deafness), upon sighting deceased, told the engineer to sound emergency blasts which the engineer did; then, when the deceased did not heed the warning, on signal from the fireman, the engineer applied the emergency brakes. Plaintiff submitted that the trainmen should have first and promptly applied the brakes. Because of the short distance (104-154 feet) between the engine and the deceased when deceased was first seen and the undisputed fact that the emergency blasts were promptly sounded, and the lack of opinion evidence showing that the injury could be avoided the court held the case to be free of submissible proof of negligence.

This was a case of an oblivious injured person and conscious defendant. If anything it was a true last clear chance case similar to *Case 3* above.

Kirkpatrick v. Wabash Ry.[16] involved a daytime train-truck collision at a grade crossing in Kirksville. The case was submitted only upon humanitarian negligence in failing to warn by sounding the locomotive whistle. The only question presented upon appeal was whether the plaintiff made a submissible case of the obliviousness of the deceased truck driver to the approach of the train.

The only two eyewitnesses, both called by plaintiff, agreed that the truck driver approached the tracks, on the side opposite the engineer, at a slow speed of 8 to 10 m.p.h. and at all times able to stop in 3 to 4 feet. The truck slowed down until "within a few feet of the crossing" then started

15. 357 Mo. 1086, 212 S.W. 2d 412 (1948).
16. 357 Mo. 1246, 212 S.W. 2d 764 (1948).

forward at an accelerated speed to the almost instantaneous collision. The near side of the locomotive struck the front of the truck. Only "a second or two, possibly less" elapsed from the commencement of apparent imminent peril until the collision. The whistle and brake controls were on the opposite side.

Under these facts, determined to be the most favorable to the plaintiff, the court found that no submissible case was made.

The opinion is sound upon the facts recited and is clearly written by Judge Conkling. It holds that the position of "imminent peril" arose only when it became apparent that plaintiff was inattentive and going to drive into the train's path without stopping; that because of the slow speed of the truck in approaching the tracks, the slowing down of the truck followed by acceleration immediately before the collision, the deceased "did not enter a position of peril until his truck reached a point so near the west rail that it could not be stopped before coming within the overhang of the locomotive. It was not until he reached his lowest speed and then thereafter accelerated his speed to go on across that there was any indication to any one that he was in fact oblivious to the danger of the oncoming train. It was at that instant that the duty to warn arose."

The *Kirkpatrick* case is another instance of retreat from the extreme position taken in the earlier warning cases where once a second or fraction of a second between the commencement of the peril and collision was held to be sufficient time to warn and avoid injury.[17] This case is based on realities saying "To make a submissible jury case . . . the evidence must disclose that a reasonably sufficient time was afforded, after peril was discoverable, during which time it was reasonably possible for the whistle to have been sounded, for Kirkpatrick to have heeded the blast of the whistle and to have stopped short of the collision." If anything, this is a last clear chance case similar to *Case 3* above.

This reasoning could have produced the same result in the case of *Knorp v. Thompson*,[18] decided *en banc* and mentioned above, without precipitating the disagreement among the court on the question whether alarm blasts of the whistle were required.

In only one place does the opinion in the *Kirkpatrick* case offer dictum which might provoke the least doubt. Here it is said: ". . . of course, the pro-

17. Chawkley v. Wabash Ry., 317 Mo. 782, 297 S.W. 20 (1927).
18. 357 Mo. 1062, 212 S.W. 2d 584 (1948).

tection of the humanitarian rule is not extended to one who with knowledge of danger willfully or wantonly rushes into it."

Suppose a person apparently and actually intent on self destruction lies on a railroad track in plain view of the trainmen of an approaching train who realize that the person will be killed if the train is, as it might be, stopped?[19]

Steffen v. Ritter[20] involved the striking and killing by a truck of a pedestrian near the center of a right angle street intersection in the early hours of the morning. The pedestrian was killed and there was no eyewitness except the defendant. The defendant testified that the pedestrian moved from a place of safety and into the rear of defendant's truck after the front of the truck had passed safely.

Apparently assuming (but casting doubt) that a humanitarian case was made, the court passed on and held good a "sole cause" instruction of defendant, noting that the instruction submitted the facts negating negligence of the defendant, and *also required a finding* that the defendant was not guilty of the negligence submitted.

The defendant's "sole cause" or "sole negligence" instruction is set forth in full and seems to be an approved form for use in cases where there is a defense of sudden movement by the injured party from a place of safety into a place of danger.

This seems to be a combination *Type 3* or *Type 4* case. It could have been submitted as a *Type 3* last clear chance case.

Bucks v. Hamill[21] involved the striking at night of plaintiff while standing near the rear of a disabled vehicle on or near the open highway, by a passing automobile. The facts were complicated and the case was submitted on primary negligence and the humanitarian doctrine, but the issues passed upon were not of general interest. This was a *Type 3* or *4* case involving the humanitarian doctrine. A verdict and judgment for defendant was affirmed upon long settled principles.

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19. See comment of Judge Ellison in State *ex rel.* Kansas City Public Service Co. v. Bland, 354 Mo. 868, 191 S.W. 2d 660, loc. cit. 662 (1946), stating that the supreme court has never directly ruled that a claimant cannot recover under the humanitarian doctrine for self sought injury or suicide. The problem, however, more properly involves the last clear chance rule.

20. 214 S.W. 2d 28 (Mo. 1948).

21. 216 S.W. 2d 423 (Mo. 1949).

Division Number Two

Johnson v. Kansas City Public Service Co.[22] involved a motor truck-streetcar collision at a right angle street intersection. The question decided was whether a case was made under the humanitarian doctrine of failure to slacken speed of the defendant's streetcar after the alleged imminent peril of the plaintiff's truck driver occurred.

Plaintiff's evidence tended to prove that plaintiff stopped before entering the intersection wherein the collision occurred; that seeing the approaching streetcar plaintiff moved forward at about two miles per hour expecting to cross in front of the streetcar traveling at a speed estimated to be from fifteen to thirty-five miles per hour. The truck driven by plaintiff was struck and damaged in the rear four and a half to five feet of the truck. The court held that no peril arose or was apparent, until the slow moving truck was actually in the path of defendant's vehicle or so close thereto that it was apparent (at the rate of speed and manner of moving) that plaintiff would not stop before reaching the path of defendant's vehicle. So it was held that no case was made by the plaintiff. This is a simple last clear chance rule problem. The case was, if anything, a case similar to *Case 1* above.

In this case plaintiff was conscious. The defendant was conscious but did not appreciate the peril until too late to avoid collision.

Roeslein v. Chicago & E. I. R. R.[23] involved the striking of an automobile by a train at a public street crossing in St. Louis in the early morning. Four railroad tracks lay in the street intersection across plaintiff's path.

The automobile had stopped at a watchman's signal to permit a train on the nearest of a series of four tracks to pass. When train one had passed the switchman waved the plaintiff motorist to cross the four tracks. When the plaintiff was crossing the third of the four tracks in the intersection, the plaintiff's car was struck in the middle by train two. Plaintiff's automobile would have cleared had it traveled eight feet farther. The case was submitted on the humanitarian doctrine as to the defendant train operator. The court approved instructions (1) on the converse of the humanitarian doctrine and (2) defining imminent peril.

This case, a combination of *Cases 3* and *4* above, involves the true humanitarian doctrine. It is notable for the approved instructions given at the instance of the defendant.

22. 214 S.W. 2d 5 (Mo. 1948).
23. 214 S.W. 2d 13 (Mo. 1948).

Hall v. Phillips Petroleum Co.[24] involved a collision between two meeting tractor trailer combinations being operated on the open highway. The defendant driver was the only eyewitness and survivor of the casualty. Plaintiff attempted to make a humanitarian case with the defendant's driver's admissions and the circumstantial evidence. The collision occurred on the defendant's right side of the highway. The tractors did not collide head on. Defendant's driver stated that the vehicles were traveling on courses which would have permitted clearance until the deceased, when thirty to thirty-five feet away, suddenly pulled into the side of defendant's vehicle striking it behind the cab.

The case under the evidence as viewed by the court most favorably to plaintiff did not make a case for the jury. It was a possible last clear chance case (*Case 3*) if anything, for the defendant admittedly was actually unaware of the movements of the other vehicle at all times.

Holdman v. Thompson[25] involved a grade crossing collision between a passenger train and a motor vehicle. The motor vehicle operator was killed as a result of the collision. The deceased motor vehicle operator drove on to the railroad tracks without stopping. The testimony of the defendant's fireman showed that he was aware of the peril of the deceased in ample time to have sounded a warning, which, if heeded, would have avoided the injury. The evidence was conflicting on the question of whether the warning was actually given. This was not a humanitarian case, but a last clear chance case similar to *Case 3* stated above. Upon the facts stated the opinion appears to be sound.

INSURANCE

ROBERT E. SEILER*

In 1948, the supreme court decided five cases dealing primarily with insurance questions: One case involved an effort to sue the insurance company directly on an automobile liability insurance policy, one involved subrogation rights under collision insurance policies, one involved the right to jury trial in an equity case under the statute requiring jury trials on the issue of whether the matter claimed to be misrepresented actually contrib-

24. 214 S.W. 2d 438 (Mo. 1948).
25. 216 S.W. 2d 72 (Mo. 1949).

*Attorney, Joplin, Missouri. LL.B., University of Missouri, 1935.

uted to the death, one involved the standard union mortgage clause and one involved a "loan receipt" between a bonding company and the insured.

The action against the insurance company directly was *Haines v. Harrison*,[1] where the plaintiff, injured in 1946 in an automobile collision wherein the driver died before plaintiff could file suit, brought his suit for damages against the administrator and the liability insurance company covering the automobile, on the theory that liability under the insurance policy attached immediately upon the occurrence of the injury and since it was impossible for the plaintiff to file an action and obtain judgment against the deceased such action on his part was not a prerequisite to relief. The court affirmed the action of the trial court in sustaining a motion to dismiss the petition because no cause of action was stated. The action in tort did not survive against the administrator.[2] Nor could the action be maintained against the insurance company because the death of the tort-feasor made it impossible to establish liability by judgment against the tort-feasor, and also ended any liability for the tort. Despite the 1947 amendment to Section 3670, it seems doubtful if the court even today would permit such an action directly against the insurance company because the court referred to the "no-action" clause of the policy and declared it was valid and enforceable.

The subrogation case is *General Exchange Insurance Corporation v. Young*,[3] where a Mrs. Swisher had a $25 deductible collision insurance policy with General Exchange Insurance Corporation. Her car was damaged in a collision on October 26, 1941. Thereafter General Exchange paid Mrs. Swisher $342.00, being the cost of repair less $25.00. Mrs. Swisher made a written assignment to General Exchange of all rights and causes of action she might have against any person for causing such damage. The other party to the collision was Young, and in November, 1941, General Exchange notified Young and his insurance carrier that it had paid $342.00 on Mrs. Swisher's repairs, had been subrogated to her rights to collect damages to her car and claimed reimbursement therefor. General Exchange filed suit against Young on December 5, 1942, for the entire $367.00 and recovered a judgment for $342.00. Young set up as one defense to this action that in May, 1942, Mrs. Swisher sued Young for

1. 357 Mo. 956, 211 S.W. 2d 489 (1948).
2. Mo. Rev. Stat. § 3670 (1939).
3. 357 Mo. 1099, 212 S.W. 2d 396 (1948).

$5,000.00 for personal injuries and doctor bills; that in July, 1943, she dismissed her suit with prejudice and executed a release of all claims for damages to person or property for a payment of $500.00. The court rejected this contention, pointing out that Mrs. Swisher filed suit after General Exchange had been subrogated to her entire property damage claim and after Young had been notified thereof. The court did not pass on the question of whether both Mrs. Swisher and General Exchange could have sued for property damage had she made only a partial assignment, but stated that where the insurer pays the entire loss, or if paying less than the entire loss nevertheless receives an assignment for the whole claim, then the insured had no further interest in property damages and the insurance company may sue in its own name. The court overrules *Subscribers at Casualty Reciprocal Exchange v. Kansas City Public Service Co.*,[4] which had for many years permitted tort-feasors to settle with a party carrying collision insurance for the amount of the deductible portion of the collision policy and then safely ignore the subrogation demands of the collision carrier.

The case involving the right to a jury trial on alleged misrepresentations was *New York Insurance Company v. Feinberg*,[5] an action in equity to cancel two life insurance policies for alleged misrepresentations (concerning prior health and consultation with a physician since the medical examination). The trial court empaneled a jury, which answered all interrogatories in favor of the beneficiaries, but the court heard further testimony without a jury and thereupon rendered a decree rejecting the answers of the jury and cancelling the policies. The supreme court held that under the terms of Sec. 5843, Mo. Rev. Stat, (1939), the question of whether the matter claimed to be misrepresented actually contributed to the death is a jury question in any case, whether law or equity, and remanded the cause for a new trial.

The case concerning the "loan receipt" was *Newco Land Co. v. Martin*,[6] an action had for money had and received, where the land company was attempting to recover $7000.00 of its money which one of its officers (who was also an agent of the defendants) had deposited to the credit of the defendants to cover his prior embezzlement from the defendants. One question before the court was the validity and effect of a certain loan

4. 230 Mo. App. 468, 91 S.W. 2d 227 (1936).
5. 357 Mo. 1044, 212 S.W. 2d 574 (1948).
6. 213 S.W. 2d 504 (Mo. 1948).

made by the bonding company to the land company. The loan of $7500.00 was made under a "Loan Receipt" reciting that the loan was repayable only to the extent of any net recovery by the land company on account of the loss occasioned by the dishonest acts of the agent, and that the land company would prosecute suit for such loss, the suit to be at the expense of and under control of the bonding company, with any recovery pledged as security for repayment. The court refused to hold that the loan agreement amounted to payment or satisfaction of the land company, and said the parties had the right to make such an agreement, that it was not against public policy and that like agreements had been approved in other jurisdictions as meeting the needs of commerce and promoting justice.

The case with the standard union mortgage clause was *Zeiger v. Farmers' & Laborers' Cooperative Ins. Ass'n.*[7] The plaintiffs had a five year $2,000.00 fire policy on their dwelling with the defendant, which was a farmers' mutual fire insurance company organized under the Missouri statutes. The trial court found that plaintiffs failed to pay the last two assessments prior to the fire, although notices of the assessments were mailed to the plaintiffs and another notice was mailed to the plaintiffs notifying them that the insurance had been suspended. There was a $2500.00 mortgage on the property in favor of Federal Land Bank, which mortgage was foreclosed about two years after the fire and the property sold for $1610.00, which was less than the amount due on the loan at the date of the fire. The insurance policy contained a mortgage clause providing that any loss or damage under the policy was payable to the Federal Land Bank "as interest (s) may appear." The insurance company failed to notify the bank of the default in the payment of the assessments by the plaintiffs, thus failing to give the bank the opportunity to continue as provided by the terms of the policy. On demand of the bank, the insurance company eventually paid the bank the full $2000.00. After the foreclosure proceedings, the bank applied a sufficient amount of the $2000.00 to plaintiffs' debt to pay same in full. The plaintiffs claimed that the bank should have credited the $2000.00 on the note on the date it received the money and that, therefore, plaintiffs were not in default on the payments at the time of the foreclosure and that the foreclosure sale was void. However, the court held that under the terms of the policy the plaintiffs did not have a dwelling covered by insurance at the date of

7. 214 S.W. 2d 426 (Mo. 1948).

the fire, nor did the plaintiffs have any rights under the policy at the time of the fire. The liability of the insurance company to the bank did not arise under the terms of the policy, but under the standard union mortgagee clause, which was a separate and distinct contract for the benefit of the mortgagee, and plaintiffs had no interest therein.

PROPERTY

WILLARD L. ECKHARDT*

In the original opinion in *Kraemer v. Shelley*[1] the Missouri Supreme Court reaffirmed the validity of covenants restricting property from transfer to or occupancy by Negroes. The court held such restrictions did not contravene guarantees of civil rights in the Constitution of the United States, and that the enforcement of such a restriction by a Missouri court was not action by the State in violation of the Fourteenth Amendment which relates only to state action. A writ of certiorari was sued out in the Supreme Court of the United States, and the judgment of the Missouri Supreme Court was reversed in *Shelley v. Kraemer*.[2] In the opinion by Vinson, C. J., the Court said:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."[3]
> "Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States."[4]

Upon resubmission, the Missouri Supreme Court stated in *Kraemer v.*

*Professor of Law, University of Missouri. B.S., University of Illinois, 1935, LL.B., 1937; Sterling Fellow, Yale University, 1937-1938.

1. 355 Mo. 814, 198 S.W. 2d 679 (1946). See Note by Betz, 12 Mo. L. REV. 221 (1947); Eckhardt, *Work of Missouri Supreme Court for 1946—Property*, 12 Mo. L. REV. 405, 413 (1947).
2. 334 U. S. 1 (1948).
3. *Id.* at 13.
4. *Id.* at 23.

Shelley:[5] "Our previous cases holding to the contrary are hereby overruled." In *Woytus v. Winkler*[6] the court applied the same rule.

Various techniques are being and will be devised to try to accomplish the same end-result as was accomplished by a direct racial restriction on ownership or occupancy enforceable by injunction or forfeiture. One such possible device was considered in *Lux v. Lewis*,[7] a suit for specific performance of the following covenant: "No sale of said lot shall be consummated without giving at least 15 days' written notice to . . . the owners of the two lots adjoining said lot on the sides, of the terms thereof; and any of them shall have the right to buy said lot on such terms." The court held that the adjoining lot owner had not accepted the offer, but had made a counter offer, which was a rejection of the original offer. The court assumed, but expressly did not decide, that the option was valid and enforceable. Such an option is not drawn along racial or color lines. The option might be an invalid restraint on alienation, or might violate the rule against perpetuities. To be an effective racial restriction such an option would have to cover use and occupancy as well as ownership. These and related problems will be fully considered in a student Comment soon to be published in the *Missouri Law Review*.

Whether an adopted child is included in the terms "children," "issue," or "heirs of body," has long caused trouble. The question may arise where there is a limitation to children, issue, et cetera. Or the question may arise where there is a gift over in the event of death without children, issue, et cetera. It would seem that in all cases the problem of construction and consequent litigation could be avoided by expressly defining the term used either to include adopted children or to exclude adopted children.

The problem was to some extent resolved in the proviso to the adoption statute in 1917:[8] "Said [adopted] child shall thereafter [after adoption] be deemed and held to be for every purpose, the child of its parent or parents by adoption, as fully as though born to them in lawful wedlock. . . . *Provided, however,* that neither said adopted child nor said parents by adoption shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or parent by adoption."

5. 214 S.W. 2d 525 (Mo. 1948).
6. 357 Mo. 1082, 212 S.W. 2d 411 (1948).
7. 213 S.W. 2d 315 (Mo. 1948).
8. Mo. Laws 1917, p. 194, now Mo. REV. STAT. § 9614 (1939).

By an amendment effective May 21, 1948,[9] the above proviso was repealed and the following diametrically opposed provision substituted therefor: "Said adopted child shall be capable of inheriting from and taking through his parent or parents by adoption property limited expressly to heirs of the body of such parent or parents by adoption." This section uses only the term "heirs of the body," and that term is not synonymous with "children" or "issue." Nevertheless the legislative policy expressed should be very important in similar problems of construction where the gift is to "children" or "issue."

Mo. Rev. Stat. (1939) § 3499 is basically directed toward the problem whether death without heirs of the body, or issue, means an indefinite failure of issue (at any time in the future after any number of generations), or a definite failure of issue (at the death of a designated ancestor). It provides as follows:

> "Where a remainder in lands or tenements, goods or chattels, shall be limited, by deed or otherwise, to take effect on the death of any person without heirs, or heirs of his body, or without issue, or on failure of issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor."

Here there is the same problem of construction, whether a person who is survived by an adopted child is survived by an heir of the body or by issue. The 1948 amendment to the adoption statute should be very important in resolving this problem.

Kindred v. Anderson[10] presented two difficult problems of construction. The testatrix died in 1900, and by a will executed in 1898 made the following devise: "5. I give and devise to my son William H. Timberlake, his heirs and assigns all my real estate. . . . 9. In the event that William H. shall die without issue then the whole of my said property shall be divided equally among all the above children." William H. Timberlake was a bachelor, 39 years of age at the time of his mother's death. In 1925 when he was 64 years of age he married a widow who had a daughter by a previous marriage. In 1934 he adopted his step daughter. He died in 1946 at the age of 85, never having had a child of his own blood. The plaintiffs claim that William had a defeasible fee simple, that "issue" meant blood issue, and that inasmuch as William never had blood issue and left only an adopted

9. Mo. Laws 1947, p. 217; Mo. Rev. Stat. Ann. § 9614.
10. 357 Mo. 564, 209 S.W. 2d 912 (1948).

daughter, the plaintiffs are now entitled under a shifting executory interest. On the other hand, the argument (a point raised by the court) in favor of the defendants, claiming through William, was that the adopted daughter was "issue" as the word was used in this will, and therefore what initially was a defeasible fee simple became a fee simple absolute. The plaintiffs relied on *Graves v. Graves*.[11] Ellison, J., in an able opinion, analyzed the *Graves* case and related cases and came to the conclusion that while "issue" prima facie means blood issue, in this case it included an adopted child, considering the will as a whole and the surrounding circumstances. The resolution of similar problems should be much easier in such future cases as are governed by Mo. Rev. Stat. Ann. § 9614, discussed above.

A second issue in the case was the defendant's contention that the death of William without issue applied only if he predeceased the testatrix, and that having survived the testatrix he took a fee simple absolute at her death, not subject to a shifting executory interest. The leading case is *Owens v. Men and Millions Movement*.[12] The court found that there was sufficient intent in this will to change the general rule of the *Owens* case, and that William took only a defeasible fee simple. However this point would seem to be moot in view of the court's construction of the word "issue."

Grannemann v. Grannemann[13] involved the construction of a residuary clause in a will:

> "6th. I give and bequeath all of the balance of my estate, both personal and real, to my beloved wife Lydia Grannemann, and after her death and the payment of the above legacies, the balance of the estate both personal and real shall be divided equally between Oscar Grannemann and Guy Grannemann *or* their heirs" (emphasis added).

Oscar survived the testator but predeceased the widow, the life tenant. After the death of the life tenant, Oscar's creditors attempted to satisfy their claims out of his interest, on the theory he had a vested remainder in fee simple absolute. His heirs claimed that his interest was a contingent remainder, subject to the condition precedent of surviving the life tenant. The court held that Oscar had a vested remainder in fee simple absolute.

The orthodox method of creating a present or future estate in fee simple is to limit the estate to "*B and* his heirs." If the draftsman of the

11. 349 Mo. 722, 163 S.W. 2d 544 (1942).
12. 296 Mo. 110, 246 S.W. 172 (1922).
13. 210 S.W. 2d 105 (Mo. 1948).

clause in question had used "and" instead of "or" the problem would not have arisen. Where a *present* estate is granted or devised to *"B or* his heirs," "or" is read as "and" and the words are treated as words of limitation giving *B* a fee simple absolute, and not as words of purchase in favor of the heirs. Where a *future* estate is granted or devised to *"B or* his heirs," there are several possible constructions. One is to read "or" as "and" and treat the words as words of limitation giving *B* a future estate in fee simple absolute. Alternative constructions are that *B* has a contingent remainder, subject to a condition precedent of survival, and his heirs have an alternative contingent remainder as purchasers; or that *B* has a defeasible vested remainder, subject to a condition subsequent of survival, and his heirs have a shifting executory interest as purchasers. In the absence of contrary intent the words are treated as words of limitation, giving *B* an estate in fee simple absolute, and not as words of purchase.[14] The court follows the orthodox rule in the principal case, distinguishing *Owen v. Eaton*[15] and *Riley v. Kirk*[16] where from additional language the court found an intent that the heirs should take as purchasers and consequently *B*'s estate was subject to a condition of survival.

In *Harlow v. Benning*[17] there was a devise to the widow "for and during the term of her natural life and *after her death* the remainder I will to all my children hereinafter named in equal parts" (emphasis added). During the continuance of the life estate there was a suit to partition the remainders subject to the life estate. If the remainders were vested, the judgment in the partition suit was valid, but if the remainders were contingent the judgment was void. The court held that the remainders were vested, the words "after her death" simply relating to the time of enjoyment of possession (vesting in possession), and not to the time of vesting in interest which was the death of the testator. The words did not designate any condition precedent other than the termination of the life estate, a condition inherent in any vested remainder.

Several other cases involved problems of construction. While "the construction of *A*'s ambiguity is no proper guide to the construction of *B*'s ambiguity,"[18] the cases point out pitfalls to avoid.

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14. RESTATEMENT, PROPERTY § 27, comments d, e (1936).
15. 56 Mo. App. 563 (1894).
16. 213 Mo. App. 381, 253 S.W. 50 (1923).
17. 357 Mo. 266, 207 S.W. 2d 471 (1948).
18. LEACH, CASES ON FUTURE INTERESTS 242, n. 8 (2d ed. 1940).

In *Coley v. Lowen*[19] the court treated "children" as synonymous with "issue" where both words were used in a limitation creating alternative contingent remainders.

In *Adams v. Simpson*[20] a testator drafted his own will and included the following clauses: "Third—The balance of my Money and property where so ever be—I wanted to be equal divided a mong my Friens and relation—Two Sisters—about Ten Neics and Nefues—I do not know where all of them are. Some in St-Joseph.Mo. and Some In Blockton, Iowa. One In Readding, Iowa. One in Chicago, ILL." The testator had in fact six nieces and nephews. The court held that this was a gift to a class composed of eight persons, his two sisters and six nieces and nephews. The words "friends and relations" were simply descriptive of this class, and were not used in a disposing sense of making a gift to "relatives" or "friends" or both.

In *Smoot v. Harbur*[21] a testator in a residuary clause made the following gift: "One fourth thereof, individually. one-eighth thereof to my niece, Burla Booker" with two-eighths each to three other named persons. The court in resolving the ambiguity held that Burla took one-fourth; this construction avoided partial intestacy.

The problem of the jurisdiction of county courts in matters affecting title to land was raised in two cases. In *Duenke v. St. Louis County*,[22] a suit to quiet title, the question was whether the county court's order and judgment vacating a public but unopened street was legally rescinded by the same county court. It was held that under Art. VI, § 36 of the Constitution of 1875 the county court was a court of record with judicial powers, and that in this case the county court was acting in its judicial rather than in its ministerial or administrative capacity; consequently the county court had judicial power to rescind its vacation order during the term.[23]

In *Bradford v. Phelps County*,[24] a case involving the county court's allowances for stenographic service to the prosecuting attorney, the supreme court emphasized that under Art. VI, § 7 of the Constitution of 1945, the county court is no longer a court in a judicial sense, but is a ministerial body managing the county's business. The same point was made in *State v.*

19. 357 Mo. 762, 211 S.W. 2d 18 (1948).
20. 213 S.W. 2d 908 (Mo. 1948).
21. 357 Mo. 511, 209 S.W. 2d 249 (1948).
22. 213 S.W. 2d 492 (Mo. 1948).
23. See SILVERS, MISSOURI TITLES § 117 (2d ed. 1923).
24. 357 Mo. 830, 210 S.W. 2d 996 (1948).

Arnold,[25] a case involving an insanity inquisition of a poor person. Both cases emphasize the changed status of the county court under the Constitution of 1945, and would seem to make it clear that the county court is no longer a judicial court nor a court of record, in matters affecting title to land.

Grose v. Holland[26] was a case of first impression in the supreme court. Land was owned by a husband and wife as tenants by the entirety. The husband murdered his wife. The question was whether the husband, as survivor, became the sole owner of the land. The court held that the surviving husband never acquired the whole property, and that the heirs of his wife had an undivided one-half. The case was fully discussed in a note in a recent number of the *Missouri Law Review*.[27]

Farr v. Lineberger[28] reaffirms the doctrine that a husband and wife may be tenants in common. In this case the conveyance ran to husband and wife as tenants in common, and not as joint tenants or as tenants by the entirety.[29]

Kennedy v. Union Electric Co. of Missouri[30] was an action to recover damages for the flooding of the plaintiff's building. The evidence sustained the finding that the flooding, near the head of the Lake of the Ozarks above Bagnall Dam, was caused by silt deposits raising the beds of the Osage River and its tributary streams in the upper part of the lake, so as to substantially affect their carrying capacity, and that this would raise the water level in these streams, retard the velocity of the water, and cause it to spread out and overflow. Judgment for the plaintiff was affirmed.

Finck Realty Co. v. Lefler[31] was concerned with the baffling problem as to whether a person can acquire title by adverse possession in the case of a mistaken boundary (fence). In this case the adverse claimant testified clearly that he intended to claim to the fence; he did not have the conditional intent to claim to the fence only if it was the true line. The court held that he had the requisite intent to acquire title by adverse possession. The court quoted with approval from *State* ex rel. *Edie v. Shain*:[32]

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25. 356 Mo. 661, 204 S.W. 2d 254 (1947).
26. 357 Mo. 874, 211 S.W. 2d 464 (1948).
27. See Note by Fitzgerald, 13 Mo. L. Rev. 463 (1948).
28. 207 S.W. 2d 455 (Mo. 1948).
29. See Eckhardt, *Work of Missouri Supreme Court for 1945—Property*, 11 Mo. L. Rev. 378, 380-383 (1946).
30. 216 S.W. 2d 756 (Mo. 1948).
31. 208 S.W. 2d 213 (Mo. 1948).
32. 348 Mo. 119, 152 S.W. 2d 174, 176 (1941).

> "The principle, as stated in all of our prior decisions, may be reduced to this: If the possessor occupies the land in question intending to occupy that particular piece as his own, his occupancy is adverse. It is not necessary that he intend to take away from the true owner something which he knows belongs to another, or even that he be indifferent as to the facts of the legal title. It is the intent to possess, and not the intent to take irrespective of his right, which governs."

G. V. Head has criticized the intention test: "The occupant's intention should, it seems, be immaterial. The issue should be one as to whether the occupant has, by words or actions, treated or dealt with the land as his own. Objective acts, and not subjective intent, should be controlling."[33]

Foxx v. Thompson[34] was concerned with whether reciprocal easements existed in a six-stall garage, concrete apron, and two driveways. Three duplexes and the garage, apron, and driveways were built in 1925 by a common owner. At some unstated date the three lots were conveyed to three different persons without any mention of easements. The facilities were used by the respective owners and occupants for more than twenty years before it was discovered as the consequence of a survey that there were encroachments on the various lots. The weight of the evidence was that the use of the apron and stalls with consequent encroachment was necessary in order that the respective owners and occupants might reasonably enjoy their properties. The court decreed reciprocal easements in the apron and stalls. The theory of the court would seem to be that there were implied grants or reservations of easements corresponding to preexisting quasi-easements; the court states that this is not a case of prescription or adverse user. The court quotes from *Greisinger v. Klinhardt*:[35] "It is not a question of prescription, but a question of the apparent attachment for the enjoyment of the property granted. It must be reasonably necessary for the enjoyment of the dominant estate. It must be apparent at the time of the severance by the original owner." It would seem further that at least in this type of case the court is requiring no higher degree of necessity for an implied reservation of an easement than for an implied grant of an easement. The principal case should be compared with the leading case of *Jacobs v. Brewster*,[36] a joint

33. Head, *Work of Missouri Supreme Court for 1941—Property*, 7 Mo. L. Rev. 408, 410 (1942).
34. 216 S.W. 2d 87 (Mo. 1948).
35. 321 Mo. 186, 9 S.W. 2d 978 (1928).
36. 354 Mo. 729, 190 S.W. 2d 894 (1945).

driveway case, where the court found reciprocal easements but applied an adverse user theory.[37]

TAXATION

PAUL G. OCHTERBECK*

The cases decided by the Supreme Court of Missouri during the year 1948 in the field of taxation are discussed under the following topics: I—Bonds issued by Public Corporations and Political Subdivisions; II—Exemption from Taxation; III—Fire Districts; IV—Income Taxes; V—Municipal Taxes; VI—Road Taxes; VII—Sales Tax; VIII—Tax Sales and Titles.

I. BONDS ISSUED BY PUBLIC CORPORATIONS AND POLITICAL SUBDIVISIONS

In *State* ex rel. *City of Kirkwood v. Smith*,[1] the question presented for determination was whether a special election authorizing $800,000.00 in bonds for waterworks and sewerage purposes was subject to all of the provisions of the permanent registration act applying to St. Louis County, wherein the City of Kirkwood is located. It was held that such permanent registration act had no application to such elections except as to registration.

In *Kansas City v. Reed*,[2] the supreme court for the *first time* expressly ruled that in determining whether a city's constitutional debt limit would be exceeded, the sinking fund must be deducted from the total debt. The court followed the majority rule in making this decision and expressly refused to follow the minority rule as announced by certain Pennsylvania decisions.

McFaw Land Co. v. Kansas City Title & Trust Co.[3] was a suit involving a title insurance policy. The court held that Drainage District bonds issued in 1912 were not a lien on the real estate; that the defendant was under no duty to report the amount of unpaid bonds; and that the assessments made in 1939 and 1940 to pay certain of these bonds were within the exceptions in the policy.

II. EXEMPTION FROM TAXATION

In *Missouri Goodwill Industries v. Gruner*,[4] the real estate of the Missouri Goodwill Industries, a charitable corporation, was held exempt from taxation

37. See Eckhardt, *Work of Missouri Supreme Court for 1945—Property*, 11 Mo. L. REV. 378, 385 (1946), for a discussion of Jacobs v. Brewster, and of the general problem of reciprocal easements.

*Attorney, St. Louis. LL.B., University of Missouri, 1931.

1. 357 Mo. 518, 210 S.W. 2d 46 (1948).
2. 216 S.W. 2d 514 (Mo. 1948).
3. 357 Mo. 797, 211 S.W. 2d 44 (1948).

on the ground that the *property was used* for purposes purely charitable. The court held that the primary purpose of this charity was to assist and train handicapped men and women to become self-respecting and self-supporting and that the selling of second-hand reworked goods and the making of any profits were incidental to its primary purpose. Most persons will agree with Judge Clark that this is "charity of a practical sort." A number of prior tax exemption cases are briefly reviewed and discussed.

III. Fire Districts

In *State* ex rel. *Normandy Fire Protection District v. Smith*,[5] the court stated that the new act[6] providing for the incorporation of fire districts was similar to the old act[7] and upheld the constitutionality of the new law. The case of *State* ex rel. *Fire District of Lemay v. Smith*[8] was followed.

IV. Income Taxes

In *Clark v. Mississippi Valley Trust Co.*,[9] it was held that where the testator provided for stipulated payments to a beneficiary, without making any provision for payment of income taxes in addition to the stipulated payments, the beneficiary should bear the burden of income taxes on such payments, the taxes having been deducted and paid by the trustee.

V. Municipal Taxes

In *City of Brunswick v. Myers*,[10] an ordinance providing for an election to approve a 20-year franchise was upheld. The court further held that the provision for a 5% license tax on gross receipts in lieu of all other taxes did not prohibit the city from later changing this provision; that there was nothing improper in the Kansas City Power and Light Company paying the city for the cost of the election; and it was perfectly proper for the Power and Light Company to wait until the voters had approved the granting of the franchise until it accepted the offer of the franchise contained in the ordinance.

In *Moots v. City of Trenton*,[11] the city was held not to have been authorized by the legislature to levy an annual license fee of $30.00 for each coin-operated musical instrument (juke box) operated within the City of Trenton.

4. 357 Mo. 647, 210 S.W. 2d 38 (1948).
5. 216 S.W. 2d 440 (Mo. 1948).
6. Mo. Laws 1947, Vol. I, p. 432.
7. Mo. Laws 1941, p. 505.
8. 353 Mo. 807, 184 S.W. 2d 593 (1945).
9. 357 Mo. 785, 211 S.W. 2d 10 (1948).
10. 357 Mo. 461, 209 S.W. 2d 134 (1948).
11. 214 S.W. 2d 31 (Mo. 1948).

VI. Road Taxes

In *State* ex rel. *Moore v. Wabash Railroad,*[12] the supreme court held that since no appropriate action had been taken under the applicable statute to constitute Jefferson Township of Nodaway County a general or special road district, this township was neither a general nor a special road district and the attempted levy of an additional road and bridge tax by this township through a special election was void and unenforceable. In other words, such an additional levy must be by a general or special road district as such, and a township without the prerequisite statutory action is neither a general nor special road district.

VII. Sales Tax

In *State* ex rel. *Otis Elevator Co. v. Smith,*[13] the supreme court *en banc* held that an elevator company which designs, constructs and installs a special elevator for a particular building would not ordinarily be liable for sales tax on the materials furnished because these materials are not sold to the owner but are "used and consumed" in constructing the elevators, which automatically become a part of the building. However, where the contract for the installation of the elevators contains a clause retaining title in the elevator company until the purchase price is paid, the elevator company is liable for sales tax on the materials furnished.

VIII. Tax Sales and Titles

In *Davis v. Johnson,*[14] a plaintiff who had been in possession for many years under a claim of right was held entitled to have a tax sale under the Jones Munger Law set aside because the land which was worth $1,500.00 had been sold for taxes of $127.50 and to have the right to redeem the land from the tax sale. A number of situations are discussed concerning persons "having an interest" in the land sufficient to maintain a proceeding to redeem from such a tax sale.

In *Horton v. Gentry,*[15] it was held that a sheriff's tax deed under a special execution passed no title because the owner of the fee was not a party to the suit; that the three year statute of limitations on tax deeds had no application to sheriff's tax deeds; and that plaintiff in a quiet title suit should receive protection as to taxes paid although the statute literally gives such protection only to a defendant.

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12. 357 Mo. 380, 208 S.W. 2d 223 (1948).
13. 357 Mo. 1055, 212 S.W. 2d 580 (1948).
14. 357 Mo. 417, 208 S.W. 2d 266 (1948).
15. 357 Mo. 694, 210 S.W. 2d 72 (1948).

In *Collector of Revenue v. Parcels of Land*,[16] it was held that under the Land Tax Collection Act applicable to Jackson County the landholder does not have the right to redeem after the foreclosure sale although the court may require the bid to be made adequate before the sale is confirmed; and that when two lots are sold and the purchaser is only willing to make his bid adequate as to one lot, the court has the discretion to confirm the sale of the one lot and to refuse to confirm as to the other lot. The constitutionality of this Act was reaffirmed.

In *Martin v. McCabe*,[17] where reissued tax bills were dated back, it was held that the "dated back" reissued tax bills and the judgment causing these tax bills to be foreclosed were void. Because plaintiff's "alter ego" and agent was an experienced real estate dealer, his knowledge of the facts was held to prevent plaintiff from claiming that she was entitled to be reimbursed for improvements upon the claim that she made improvements in good faith in ignorance of the true state of the title. It was also held that proof of actual notice may be made by showing knowledge of facts which if followed up would have led to notice.

TORTS

GLENN A. MCCLEARY*

The further increase in the work of the court during the year is seen in the large number of decisions involving liability for tort. There were seventeen decisions in this field of the law by the court *en banc*, which to the writer seemed to be a higher proportion of *en banc* cases in tort cases than in previous years. For adequacy of treatment, the cases having to do with the humanitarian doctrine are discussed elsewhere in this issue by Mr. Becker.

I. NEGLIGENCE

A. *Duties of persons in certain relations*

1. Possessors of land

Injuries to invitees as a result of slipping and falling on substances on the floor of the defendant's business premises were before the court in two cases. In *State* ex rel. *F. W. Woolworth Co. v. Bland*,[1] after judgment for

16. 357 Mo. 1231, 212 S.W. 2d 746 (1948).
17. 213 S.W. 2d 497 (Mo. 1948).

*Professor of Law and Dean of the Law School, University of Missouri.

1. 357 Mo. 339, 208 S.W. 2d 263 (1948) (*en banc.*)

plaintiff in the trial court, the supreme court granted certiorari on the ground that the record failed to show that the dangerous condition of the floor had existed for any length of time prior to the fall, so that the company could not be charged with notice of the dangerous condition. The evidence showed it was a wet, sloppy, February day, that customers had been tracking muck into the store all day, and to such extent that an antislip preparation was sprinkled on the floor to keep it from becoming slippery; that the muck accumulated so rapidly as to make it necessary to mop the floor at thirty minute intervals, which would remove the antislip preparation unless it was applied anew; that the floor at the entrance where the accident occurred had been mopped about thirty minutes before the plaintiff entered the store, sometime around after four-thirty o'clock in the afternoon; that out of doors the ground had frozen over by that time of day and there were patches of ice on the sidewalk; and that the plaintiff was a step or two inside the store when she slipped on the accumulation of dark, wet, muddy substance on the floor. This evidence was held to show that the defendant's employees were fully aware of the dangerous condition and the only question was whether ordinary care was used to remedy a condition known to exist. On this issue the finding by the Kansas City Court of Appeals was adopted which held that the plaintiff "made a submissible case in that the jury could reasonably infer from the evidence that the condition of the floor when plaintiff fell had existed for a half hour or more; that defendants did not mop it and apply non-skid material as claimed, or if they did, it was done negligently and ineffectively; that defendants knew, or by the exercise of ordinary care could have known, of the condition existing when plaintiff fell in time to have removed the accumulated muck and failing to do so caused plaintiff to fall."

On the other hand, in *Lance v. Van Winkle*,[2] plaintiff's evidence was not sufficient to establish constructive notice to the defendant storekeeper of the presence of an ice cream cone on the store entrance, on which the plaintiff slipped and fell, where the only evidence tending to prove the length of time that the ice cream and cone were present was testimony that the ice cream appeared to have dried, nor was the defendant charged with actual notice of the cone because defendant's porter, whose duty it was to inspect the vestibule, had passed through it only a few minutes before the accident, where it was not shown that the cone was actually present and subject to

2. 213 S.W. 2d 401 (Mo. 1948).

view. In this case the plaintiff had recovered a judgment for $15,000 for injuries received when she slipped and fell on the step of the entrance vestibule of a Kresge Store in St. Louis. The defendant Van Winkle was the manager of that store. The plaintiff was leaving the store by an entrance which had a vestibule several feet long leading to the sidewalk. The floor of the vestibule was six inches above the level of the sidewalk. As the plaintiff walked through the vestibule she glanced in the show windows. She slipped on the step leading down to the sidewalk and fell. When she raised up she saw that she had stepped on the ice cream and cone which had caused her to slip. After judgment was rendered for the plaintiff, the defendants filed a motion to set aside the verdict and judgment, and for a new judgment in their favor. The motion was sustained on the ground that the evidence showed neither actual nor constructive notice of the presence of the ice cream and cone on the step of the vestibule.

Injuries received by plaintiffs as a result of falling down elevator shafts were before the court in two cases. In *Happy v. Walz*,[3] the plaintiff, 72 years of age and a prospective customer, fell down an unguarded and unlighted elevator shaft in entering from the rear of the defendant's hardware store. The elevator was for freight and not for passengers. The principal issue as to the defendant's negligence turned on whether the plaintiff's "intended" use of the "rear" door of the building, in approaching the store from the alley and open area to the rear, was within the scope of the invitation to business invitees. There was no evidence that the defendant had expressly invited customers to come into the hardware store through the "rear" entrance, nor was there evidence that the defendant had expressly invited customers to drive their automobiles into the alley and park when approaching the store, as had the plaintiff on this occasion. While the main entrance to the defendant store was on the public street, the evidence showed that some of the residents of the neighborhood and others, who knew about the "rear" door to the hardware store, used the door when as customers they entered the store, and although the defendant knew of this practice he had never told anyone not to walk in the back way. Some customers would drive in the alley to pick up purchases. In affirming an order granting plaintiff a new trial after a verdict for defendant, the court held there was substantial evidence tending to show that prospective customers were impliedly invited to approach the defendant's store by way of

3. 213 S.W. 2d 410 (Mo. 1948).

the rear entrance and, in so doing, to use the private alleyway for the parking of cars. Therefore, the defendant would owe a duty to the plaintiff to exercise ordinary care to have the approach to the door in a reasonably safe condition. The difficulty which the writer has with the case is that the facts show that the plaintiff did not enter the "rear" door; instead he entered through one of the double doors which separated the loading dock and the elevator shaft and which was standing open "better than ninety degrees," as he passed from the loading dock into what he thought was the rear entrance to the store. It was 27 feet 9 inches from the elevator doors to the rear-entrance door of the hardware store. The evidence as reported in the decision, from which an invitation may be inferred to customers, pertains to the use of the "rear" door and not to the elevator doors at this considerable distance away. The evidence showed that the plaintiff had used the "rear" door in leaving the store but he had never before entered by way of the alley, and that in the approach the "rear" door could not so readily be seen as could the elevator-shaft doors, since the line of vision was almost parallel with the wall containing the "rear" door and from such a point this door would have been at best but imperfectly visible to him. The double elevator-shaft doors were not like the rear-entrance door, but there was no mark or sign on or near the elevator-shaft doors and nothing in their appearance indicating that they were not entrance doors to the rear of the defendant's store. On these facts the court raised the question: "Should it not have been anticipated, in the exercise of ordinary care, that an invitee in so approaching the store (especially an invitee such as the plaintiff, who was not familiar with the exterior of the rear-entrance door) might reasonably mistake the elevator-shaft doors for the rear door?" Since plaintiff had no knowledge that an elevator shaft was in the store, and there were no artificial lights in or about the shaft or its doors, and the shaft was "very gloomy," it could not be said that the elevator-shaft was obvious to an invitee who had a right to assume the approaches were reasonably safe. Therefore, the plaintiff was not contributorily negligent as a matter of law.

The second elevator case was *Phegley v. Graham*,[4] in which the plaintiff recovered a judgment against the owner of a hotel for injuries sustained when he lost his balance and fell down the passenger shaft at the hotel. The hotel was occupied mostly by persons who were permanent residents and the plaintiff had been a resident for approximately one year prior to the

4. 215 S.W. 2d 499 (Mo. 1948).

accident. During this time he had used the elevator twice or oftener daily. His apartment was on the 10th floor. The passenger elevator was of the self-operating type and no operator was furnished by the hotel. The outer door to the elevator shaft on the lobby floor, one of the doors involved, had to be pulled back before one could open the mesh or lattice work door, called the inner door, to the elevator. The space between the two doors was two to three inches. The outer door was supposed to have an interlocking device which would prevent it from being opened if the elevator car was not at that floor level. On this occasion the plaintiff had left the lobby on the main floor of the hotel, walked up four steps leading from the lobby to a balcony, or aisle, to take the elevator which was about 15 to 20 feet from the steps on the aisle. As he walked up the steps he saw a man come down the aisle who had just stepped off the elevator. The plaintiff did not step into the shaft but lost his balance while reaching for the inner door which he had reason to believe to be there. In determining that the plaintiff was not contributorily negligent as a matter of law, the court distinguished this case from cases where the elevator shaft doors could be opened whether or not the car was at that level.

It is well settled law that it is the duty of the city to maintain its sidewalks in reasonable repair, and that the occupant of an abutting building is not liable, in the absence of statute, for injuries to a pedestrian through failure to maintain the sidewalk in repair if the occupant did not cause the necessity for repair, nor from a defect in the walk which he did not cause; but he is liable where his affirmative acts have created a dangerous condition which result in harm to those properly using the walk. In *Berry v. Emery, Bird, Thayer Dry Goods Co.*,[5] defendant appealed from a judgment for plaintiff for injuries received by plaintiff as she was walking on the public sidewalk in front of the defendant's store which abuts on the sidewalk, when a truck came into contact with a street-light standard or pole set in the concrete of the sidewalk as it was backing into a parking space along the curb in front of the store. At or near its base, the standard had for some time been cracked throughout approximately 56% of its circumference. The standard was broken off by the contact with the truck and, in falling, struck the plaintiff causing severe injuries. The plaintiff alleged that the light standard and fixtures thereon were owned, controlled and maintained by the defendant store company; that it was negligent in maintaining this particular standard

5. 357 Mo. 808, 211 S.W. 2d 35 (1948).

after it had been broken; and that it was negligent in failing to remove, remedy, abate or repair the standard or its unsafe condition, having knowledge of its unsafe and dangerous condition. The evidence showed that the company had put the standards in for its own benefit primarily in providing illumination of the sidewalk, and of the arcade and the display windows of its store. There was no evidence that the City had accepted the standards and was exercising exclusive control over them as a part of the exercise of its power to light the streets of Kansas City, but on the contrary there was evidence tending to show that the company continued to exercise control of the standards and to maintain them. The court held that "having the ownership, or having assumed the responsibility of the ownership, control and maintenance of the standards so set in the sidewalk, Dry Goods Company had the duty to exercise due care in maintaining them in a reasonably safe condition for travelers." The backing of the truck into the standard was held not to be such an extraordinary occurrence as to be held, as a matter of law, to interrupt the causal connection of the company's negligence. The question whether the defendant's negligence was the proximate cause, concurring with the negligence of the driver of the truck, was for the jury.

2. Railroads and other carriers

An interesting interpretation of the scope of injuries included within the Boiler Inspection Act was before the court in *Urie v. Thompson*,[6] where a judgment for the plaintiff was reversed by the court *en banc*, the court holding that damage for silicosis, from the railroad company allegedly violating the Act in permitting sand particles to penetrate the locomotive cab due to faultily adjusted "sanders," was not within the purview of the Act. Considering the language of the Act itself, its preamble, its history, and its ancillary regulations, the court found that the purpose of the Act was to impose an absolute duty to so maintain a railroad locomotive and its appurtenances or equipment in a safe and suitable condition, to the end that it may be employed in the active service of the carrier without unnecessary peril to life or limb by accidental injury; that "there is a definite differentiation generally, in the adjudicated cases between 'accidental injury' (accidental in the sense that the injury is attended by force or violence), and pneumoconiosis (including silicosis), which is evidenced by pathological changes in lung structure attributable to the effects of the inhalation of harmful dusts over a period

6. 357 Mo. 738, 210 S.W. 2d 98 (1948) (*en banc*).

of time." On certiorari to the United States Supreme Court, that Court in a 5 to 4 decision reversed the judgment of the Missouri Supreme Court and remanded the cause with instructions to reinstate the verdict for the plaintiff, on the reasoning that the Boiler Inspection Act and the Safety Appliance Acts are substantially, if not in form, amendments to the Federal Employers' Liability Act; that an injury for which recovery may be had for violation of the Boiler Inspection Act is no narrower in scope than injury for which recovery is authorized under the Federal Employers' Liability Act; that "injury" in the Federal Employers' Liability Act is not confined to those inflicted by external and accidental means; that silicosis which results from the employer's negligence is an injury within the Federal Employers' Liability Act; and, therefore, silicosis contracted by an employee, because of the employer's negligent failure properly to adjust sanding devices on steam locomotives used in interstate commerce, was compensable under the Boiler Inspection Act.[7]

Mr. Justice Frankfurter, in speaking for the minority, concurred in that part of the decision permitting a recovery for an occupational disease under the Federal Employers' Liability Act, but he agreed with the Missouri Supreme Court that occupational diseases cannot be fitted into the category of "accidents" within the Boiler Inspection Act. He said: "I think I appreciate the humane impulse which seeks to bring occupational diseases within such a regime. But due regard for the limits of judicial interpretation precludes such free-handed application of a statute to situations outside its language and its purpose. To do so, moreover, is, I believe, a disservice to the humane ends which are sought to be promoted. Legislation is needed which will effectively meet the social obligations which underlie the incidence of occupational disease. . . . The need for such legislation becomes obscured and the drive for it retarded if encouragement is given to the thought that there are now adequate remedies for occupational diseases in callings subject to Congressional control. The result of the present decision is to secure for this petitioner the judgment which the jury awarded him. It does not secure a proper system for dealing with occupational diseases."

The case was originally brought under the Federal Employers' Liability Act. The Missouri Supreme Court, in the first appeal,[8] had affirmed the trial court's ruling in sustaining defendant's demurrer to the complaint, on the

7. Urie v. Thompson, 69 Sup. Ct. 1018 (1949).
8. Urie v. Thompson, 352 Mo. 211, 176 S.W. 2d 471 (1943), noted in 9 Mo. L. Rev. at 347 (1944).

ground that the action could not be maintained by virtue of the Federal Employers' Liability Act alone, for the reason that the defendant could not have anticipated plaintiff's injury, and therefore the petition did not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act; that the claimed malfunctioning of the locomotives' sanders was in substance an allegation of breach of Section 2 of the Boiler Inspection Act. On remand, the petitioner amended his complaint to charge specific violations of the Boiler Inspection Act. After judgment for the plaintiff in the trial court, the case was again appealed to the Missouri Supreme Court. The reversal of that judgment is the decision discussed above and which was taken on certiorari to the United States Supreme Court. In the United States Supreme Court the respondent contended that the sufficiency of the petitioner's original claim for negligence involved in the first appeal was not properly there, since it was neither raised nor considered on the second appeal to the Missouri Supreme Court. Mr. Justice Rutledge pointed out that the Missouri Supreme Court on the first appeal had remanded the cause for trial, not for dismissal, and the judgment, therefore, was not a final judgment and precluded review by the United States Supreme Court at that time. Therefore, the petitioner did not waive that question by amending his complaint in conformity with the court's mandate to state his claim more specifically under the Boiler Inspection Act or by proceeding with trial on that theory, for "as the case then stood, this was his only remaining chance for success unless he was to waive it, ask for final judgment to be entered against him on the general negligence issue, and rely solely upon securing review of that judgment and reversal by this Court." It was further said that "local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. . . . Accordingly, even if it should be held that petitioner has stated no claim under the Boiler Inspection Act, the judgment now in review cannot stand unless the Missouri Supreme Court rightly concluded, on the first appeal, that petitioner's original complaint stated no cause of action for negligence under the Federal Employers' Liability Act, considered apart from any effect of the Boiler Inspection Act."

An interesting application of well settled legal principles was made in *Hoops v. Thompson*,[9] in an action against a railroad for injuries sustained

9. 357 Mo. 1160, 212 S.W. 2d 730 (1948) (*en banc*), noted in 14 Mo. L. REV. 209 (1949).

when scalding steam was released by a locomotive as it was passing over a railroad bridge. The plaintiffs were sitting on one of the piers of the bridge about nine o'clock at night. The theory of the plaintiffs' case was that the defendant owed a duty of lookout for persons using the bridge since it had actual or constructive notice that people habitually used its track over the bridge. The court found the evidence to be sufficient to require the railway to keep a look-out for pedestrians crossing the bridge, but the proof of user was not sufficient to require the employees of the railroad in operating trains over the bridge to keep a look-out for persons sitting on the pier where the plaintiff's were injured. To constitute constructive notice of such user, the use must be open and constant over such period of time as to raise the presumption that it is known to the employees of the railway. Only one witness testified that he ever saw any one sitting on the pier. Others testified that they had seen children on the pier, but how frequently they did not say. The judgment for the plaintiff was reversed as no submissible case was made because there was no proof that the trainmen actually saw the respondents and there was no duty to look for trespassers sitting on the piers.[10]

A new question was raised in *Graham v. Thompson*[11] as to whether Section 5163 of the Missouri statutes, providing that a railroad lessor shall remain liable for all acts and liabilities of lessee, enlarges the Federal Employers' Liability Act with respect to liability of a lessee railroad for injuries to an employee of the lessor railroad. Under the federal Act a railroad common carrier while engaged in interstate commerce shall be liable in damages to any person suffering injury "while he is employed" by such carrier in such commerce. The court held that the use of the quoted words is a full preemption by the federal government, and the federal Act does not apply to one not the railroad's servant and employee; that an employee of a lessor railroad does not automatically become an "employee" of a lessee railroad under the federal Act, if and when injured by the lessee's sole and separate operations, notwithstanding the Missouri statute providing that a lessor railway shall remain liable for all acts and liabilities of its lessee as if the lessor operated the road itself. The difficulty of the case is seen in the number of times it was considered in the supreme court and also in the division of the members of the court on its solution. Two dissenting judges entertained the views of Division II where the case was first argued and submitted. After opinion in

10. A more complete analysis of the problem is found in 14 Mo. L. Rev. 209 (1949).

11. 357 Mo. 1133, 212 S.W. 2d 770 (1948) (*en banc*).

that division, of the court's own motion, the case was transferred to the court *en banc*. After reargument and resubmission there and after opinion in the court *en banc* a rehearing was granted. The case was again reargued and resubmitted.[12]

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12. Other cases involving the liability of railroads and other carriers. Piehler v. Kansas City Public Service Co., 357 Mo. 866, 211 S.W. 2d 459 (1948), where the issue was whether the 11 year old plaintiff was thrown out of the defendant's street car in the manner claimed by him or whether he jumped out as claimed by the defendant. The plaintiff and two other boys who were 12 years of age were on their way to go horseback riding. As the street car approached the end of the line the three boys were the only passengers. At the end of the line the street car enters a loop which forms a perfect semicircle with a radius of 75 feet. It was a warm day and the street car windows were open. As the street car approached the loop the boys saw the station wagon which was to meet them going toward "the zoo." The other two boys jumped out of the street car window and ran toward the station wagon. The plaintiff went to the back of the car, got up on the long seat with his right knee in the seat and his right hand on the window sill and began ringing the buzzer with his left hand. As the car went around the loop it picked up speed, threw the rear end around, and the plaintiff was thrown head first out of the open window. He caught and held onto a window sill until the car crossed a portion of the loop when he fell to the ground and the street car ran over his foot. Defendant claimed that to be thrown by this movement of the car in the same direction the car was moving was contrary to "natural law." The court said, in ruling on defendant's appeal on the ground that the trial court should have sustained its motion for a directed verdict, that "notwithstanding the court's omniscience concerning 'natural law,' it cannot be said that the described circumstances are so manifestly contrary to some immutable law of physics that this court may summarily dispose of the case upon this ground alone."

In State *ex rel.* Thompson v. Cave, 215 S.W. 2d 435 (Mo. 1948) (*en banc*), the court held that a railroad was not negligent in blocking a public road crossing without providing warnings or signals, unless there were special circumstances which made the crossing peculiarly hazardous and the burden was on the one seeking damages to prove such special circumstances. Here the plaintiff sustained injuries while riding as a guest in an automobile when it collided with a boxcar standing on the railroad crossing at night. The only evidence as to the especially hazardous circumstances was that the downward slope of the road toward the crossing naturally caused the lights of the automobile to be deflected downward underneath the freight car, and the dark color of the road and freight car made it difficult to discover the obstruction. In reversing a judgment for the plaintiff, the court distinguished the facts of the case from one where the crossing was blocked by a flatcar with only the narrow edge of the platform visible to persons coming along the street, where the visibility was reduced by a light fog or mist, and where a boxcar on an adjoining track obstructed the view. The court thought it incredible that the car lights would shine under the freight car without also disclosing its presence on the crossing.

In Schonlau v. Terminal R. Ass'n of St. Louis, 357 Mo. 1108, 212 S.W. 2d 420 (1948), the action by a baggage handler in the union station was brought under the Federal Employers' Liability Act for injuries allegedly caused in furnishing an unsafe place to work due to the bumpy condition of the subbasement floor. The defendant appealed from a judgment for the plaintiff on the ground that the plaintiff's evidence of an unsafe place to work was not sufficient to support the verdict. Since the evidence made a prima facie case of negligence, the court held that under the decisions of the United States Supreme Court in actions under the Federal Employers' Liability Act, an appellate may not weigh conflicting evidence and arrive at a different conclusion.

Hill v. Terminal R. Ass'n of St. Louis, 216 S.W. 2d 487 (Mo. 1948) (*en banc*),

3. Automobiles

The automobile cases decided during the year under review, where liability was predicated on primary negligence, did not raise questions of sufficient significance to be discussed at length. These cases are, however, noted below.[13]

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was an action for injuries sustained by a switchman while attempting to board a moving car from the bottom of a ditch adjacent to the track. Whether the switchman had a duty to enter the ditch area for the purpose of boarding a moving car, so that the employer had a duty to exercise ordinary care to make the bottom of the ditch reasonably safe for such use, was under the evidence for the jury. The appellant-employer had contended that the master was not liable where the servant's use of the instrumentality or place is for a purpose not intended or required by the master. The switchman's attempt to board the moving car from the ditch was not obviously so dangerous and foolhardy as a matter of law, so as to bar his recovery on the theory that his action was the sole proximate cause of the injury, in view of the evidence with reference to the use of the ditch in this manner and the employer's knowledge of and acquiescence in such use.

13. In Ruby v. Clark, 357 Mo. 318, 208 S.W. 2d 251 (1948), the question was whether a submissible case was made on circumstantial evidence where judgment was given for the defendant in the trial court on a motion for a directed verdict. The action was for the death of plaintiff's son when struck by an automobile allegedly driven by the defendant as the deceased was walking along a highway at night. There were no witnesses present. The court found sufficient circumstantial evidence which would have supported a finding by a jury of liability to reverse the judgment and remand the cause. Hamre v. Conger, 357 Mo. 497, 209 S.W. 2d 242 (1948), was an action to recover for injuries sustained in a collision between an automobile driven by one of the defendants (son) and owned by the other defendant (father) and a truck driven by plaintiff. The latter defendant counterclaimed for damage to the automobile and for loss of service and medical care for the son, and the former defendant counterclaimed for injuries. Plaintiff's instructions given by the trial court, requiring the defendant to use the highest degree of care but requiring the plaintiff truck driver to exercise only ordinary care, were held to be prejudicial to sustain the judgment of the trial court in granting the defendant a new trial after verdict for the plaintiff, although in the defendant's instructions on alleged contributory negligence and for counterclaim the highest degree of care on the part of the plaintiff was required.. An instruction authorizing the jury to consider circumstances of aggravation was held proper in Hertz v. McDowell, 214 S.W. 2d 546 (Mo. 1948) (*en banc*), where the mother-executrix, in suing for wrongful death of son resulting from being struck by defendant's motortruck at street intersection, had alleged specific negligent acts of defendant performed recklessly and with indifference to rights of deceased, and where the evidence indicated that the truck approached the busy intersection at a speed of 20 to 30 miles an hour, entered the intersection against a red traffic light, and that the driver did not sound any warning or did not attempt to use the emergency brake. The decision also involves an effort by the defendant to instruct the jury to take into consideration the life expectancy of the mother who was 90 years of age, and an effort to limit the jury in computing damages to the amount of money which the deceased actually contributed to the support and maintenance of the plaintiff during his life and the amount he would have contributed to her support and maintenance had he lived. In Prague v. Eddy, 214 S.W. 2d 521 (Mo. 1948) (*en banc*), in guest's action for injuries sustained in an automobile collision when host attempted to turn automobile across highway in front of codefendant's approaching automobile, an instruction given for the plaintiff, after stating that if the jury found that the host's car was turning across the highway while the codefendant's car was approaching, then

4. Lessor-lessee relationship

In *Roach v. Herz-Oakes Candy Co.*,[14] the action was for the wrongful death of the plaintiff's former husband, an experienced window washer, who was killed as a result of falling from the fourth-story window of a building belonging to the defendant Mercantile-Commerce Bank and Trust Co. The defendant Candy Company was joined as party defendant as lessee of the defendant Trust Company, on the theory that as lessee it was in occupancy and control of the building. Motions for directed verdicts by both defendants had been sustained by the trial court. The plaintiff had alleged in her petition that the window which the decedent was washing when he fell was in a dangerous and defective condition; and that defendants were negligent in permitting the window to become and be in such condition, in assuring decedent the window was safe for washing, in suffering and permitting the window washing when defendants knew or should have known the window was in that condition, and in failing to warn. The decedent was the employee of an independent contractor who had contracted to do the window cleaning work for the candy company, and worked with materials supplied by his employer, the contractor. There was evidence by two carpenters, who worked for a contractor (Morrison) employed by the lessor to remodel and improve

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it was the duty of the codefendant "to exercise the highest degree of care to operate his automobile in a careful and prudent manner and at a rate of speed so as not to endanger the life and limb of any person there, and particularly the plaintiff," was misleading and unsupported by the evidence, in that the jury got the impression that the codefendant was negligent if he was driving at a high rate of speed *before* the host began to turn. Neither could an inference of high speed arise by the extent of damage to the two cars. In Browne v. Creek, 357 Mo. 976, 209 S.W. 2d 900 (1948), the evidence disclosed that the driver of a truck which had gone into a ditch had induced a motorist to stop, and that the truck's lights blinded the driver of an overtaking automobile which crashed into motorist's automobile parked on the pavement and injured the occupant of the overtaking automobile. This sustained the specific charge that the defendant had negligently parked the truck close to the highway with blinding lights and thereby proximately caused the collision. The fact that there was no proof or submission of alleged negligent failure to warn or to maintain a lookout, as also charged in the petition, becomes immaterial, since the various specific charges of negligence were separately alleged and the pleading and proof of one, the blinding lights, was sufficient. In Nichols v. Bresnahan, 357 Mo. 1126, 212 S.W. 2d 570 (1948), plaintiff's action was for personal injuries sustained as a result of being struck by defendant's automobile. On appeal from a judgment for the defendant, the plaintiff could not contend that there was gross negligence, since the theory of her petition and of her case throughout the trial was not negligence but willful, wanton and reckless conduct. The trial court quite properly refused her instructions defining the highest degree of care, as such instructions would have to apply to a theory of negligent conduct. The court in its opinion sets forth the difference between conduct which is negligent and conduct which is willful, wanton and reckless.

14. 357 Mo. 1236, 212 S.W. 2d 758 (1948), noted in 14 Mo. L. REV. 219 (1949).

the building, that they were told by their employer to go to the fourth floor "and fix a window that was loose up there . . . one window, the top sash of the window was hanging by the sash cord . . . out of the frame." This contractor testified that his attention had been called to the fact by "a Mr. Herz." The carpenters put the sash back in place and put some nails under it to hold it in place. This was the window below which deceased's body was found. The window had not been washed. One witness testified that the window was not then nailed up and was just hanging there, but other witnesses testified that the window was then closed and that it had been nailed up. The decedent was last seen alive washing windows on that floor. The court held that there was no evidence tending to show the appearance of the window prior to the casualty whereby it could be reasonably determined what defect, if any existed, caused the window to come out of the frame. There was no evidence that this window was latently rotten and it was not shown there was a defect in the window which was not obvious to the decedent. The only evidence tending to show that the window was in a defective condition was that after the casualty there were slivered-off portions of the sash or of the side of the frame found on the window sill. No attempt was made to further describe the apparent condition of the splinters or to otherwise describe the window, its frame and their condition. "The fact that pieces of the sash or frame were slivered off after the casualty," said the court, "does not have substantial probative force in tending to prove that the sash came out of the frame because the sash or the frame was latently rotten and defective, nor does it tend to prove in what respect, if any, the sash or frame was otherwise defective." Therefore, no knowledge of any defect in the window was shown in the lessee. The court also held that there was no evidence that the lessor had through its contractor negligently repaired the window or had done any work in repairing the window from which the deceased fell, assuming there was a hidden defect in the window at the time the lessee entered, nor, that the lessor had notice or knowledge, actual or constructive, of the defect.[15]

Involved in the case was also the legal question, the proper solution of which the courts in this country are not agreed, as to the duty owed by a contractee to an employee of an independent contractor to furnish reasonably safe appliances and a reasonable safe place to work, analogous to that of an employer. The court differentiated between instances where the contractee

15. For a more complete analysis of the liability of a lessor and of a lessee of premises for injuries sustained by an invitee while on the premises, see note on the principal case in 14 Mo. L. Rev. 219 (1949).

had undertaken to furnish and has retained control of the place and of the appliances in and with which the independent contractor is to perform his contract. Under the circumstances of the instant case where the work was executed by methods and in a manner of a special type of work, where the appliances and materials were supplied by the contractor, and where the work was not that in which the Candy Company (the contractee) was engaged or in which its officers had any special knowledge or experience or supervisory skill, the court did not think the contractee should have the full responsibility of an employer. Under these circumstances the court held that the decedent was an invitee to whom the Candy Company would be liable for injury "'occasioned by any unsafe condition of the premises encountered in the work, which was known to it but unknown to him; but was not liable for injuries resulting from conditions obviously dangerous and known by the deceased to be so.'"[16]

5. Municipal corporations

Dowell v. City of Hannibal[17] was an action for the wrongful death of plaintiff's husband when his truck went out of control, as he was driving east on a block long city street with a 10 per cent downgrade, and he was unable successfully to make the turn on to the north-south street at the dead end. The truck went over the east side of the north-south street at a point about 15 or 20 feet south of the point where the street from the west joined, and down a steep incline until the truck struck a tree where the deceased sustained fatal injuries. The negligence alleged by the plaintiff was the failure of the city to erect a barrier along this north-south street and covering the point where the truck went over the side. The city had erected a barrier on the east side of the north-south street opposite to the dead-end street joining from the west to protect vehicle traffic coming down the 10 per cent grade on that street. The judgment for the plaintiff in the trial court, which was affirmed by the St. Louis Court of Appeals but certified to the supreme court on the dissent of one of the judges, was reversed on the ground that the city was not negligent because it had erected a barrier on the east side of the street only at a place opposite the point where the dead-end street with a 10 per cent incline entered, although the declivity extended both north and south of the barrier. The duty of a city to exercise ordinary care to maintain its streets in a reasonably safe condition did not extend to unusual and ex-

16. The court cited the annotation on the problem in 44 A.L.R. 932, at 938-944 (1926).

17. 357 Mo. 525, 210 S.W. 2d 4 (1948).

traordinary occurrences such as that in the instant case. The court distinguished this case from those where the plaintiff receives injuries from declivities or other dangerous defects close to a street, because of failure to erect barriers or to take other reasonable precautions, so as to render the street itself unsafe to a traveler as a result of an accidental misstep. Here the deceased did not suffer from any casual or ordinary deviation from the roadway, nor was there any danger of his doing so.

In *Hinds v. City of Hannibal*,[18] the action against the city was for personal injuries predicated on an alleged assault by a policeman on the plaintiff while the plaintiff was in jail. In addition to other allegations, the petition alleged that the defendant had retained this officer in its employ in its police department "with full knowledge of his many various, vicious, malicious, willful, deadly and felonious assaults upon people in Hannibal"; that previous specified assaults were known to the defendant "or by the exercise of reasonable and ordinary care could and should have been known"; and that his acts "were extremely dangerous to the safety of the life and limb of the people of and in the City of Hannibal, and was such an open and notorious menace to the public generally as to constitute a nuisance." It further alleged "that the defendant, by its wrongful, reckless, careless and negligent failure, neglect and refusal to prevent the vicious, malicious, willful, deadly and felonious assaults upon the people of and in the City of Hannibal by its servant and agent . . . or to otherwise abate the nuisance created, did thereby ratify, encourage, condone and approve the vicious, malicious, willful, deadly and felonious assaults upon the people in and of the City of Hannibal and encourage their commission by the said . . . defendant's agent and servant." The plaintiff's theory was that his petition stated a cause of action for having and maintaining a nuisance, and for failure to abate the nuisance. The court, however, held that the plaintiff's case was based on negligence since tort liability under the incompetent servant rule was a part of the law of negligence. Negligence and nuisance were distinguished in that " 'negligence' is the failure to exercise the degree of care required by the circumstances," while " 'nuisance' does not rest on the degree of care used, but on the degree of danger existing with the best of care," and "that creating or maintaining a nuisance is the violation of 'the absolute duty of refraining from the participating acts, not merely the relative duty of exercising reasonable care, foresight, and prudence in their performance.' " Here the duty of the city in its govern-

18. 212 S.W. 2d 401 (Mo. 1948).

mental function of maintaining a police force was a duty of care in the selection and retention of police officers, and "not 'the absolute duty of refraining from participation' in their selection and retention." Thus the rule of immunity from tort liability for the acts of public officers in the exercise of governmental functions was applicable in sustaining the trial court in dismissing the petition on the ground that it did not state facts sufficient to entitle plaintiff to any relief.

6. Employer-employee relationship

The borrowed servant problem was presented in *Wills v. Belger*,[19] in an action by an injured employee of the borrowing employer against the general employer of a borrowed truck driver for injuries sustained as the result of alleged negligence of the driver while the plaintiff and the borrowed truck driver were delivering groceries for the borrowing employer, the Morgan Grocery Company. Under Missouri decisions, where one is in the general service of another yet, with respect to particular work, may be the servant of another, "to escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person." It thus becomes "necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary co-operation where the work furnished is part of a larger operation. A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out the work to the servant, or gives him signals calling the service into activity." On appeal from a judgment for plaintiff, the original employer contended that the driver of the truck, at the time of the occurrence, was not engaged in the defendant's business and subject to his direction and control, but was under the direction and control of the borrowing employer, the Morgan Grocery Company, and engaged in the work of that company, and that the trial court should have directed a verdict for the appellant. The evidence showed that the general employer was engaged in the transfer, hauling and cartage business; that he owned the trucks and hired, fired and paid the drivers; that the driver involved in this accident was in his general employment as a truck driver; that this driver reported to the office of the general employer each morning and each evening; that he checked in and checked out and placed the truck in the general employer's garage each night; that each morning the general employer told this driver where to go; that when

19. 357 Mo. 1177, 212 S.W. 2d 736 (1948).

he had sent this driver to the Morgan Grocery Company on the day of the accident the general employer knew the type and kind of work he would do after he got there, to-wit, that groceries would be hauled and delivered to Morgan's customers; that when the day was over or the work finished the driver would report to the general employer's office; that the general employer at all times furnished gasoline, oil, repairs and road service; that the general employer was "subject to cargo loss" and carried "drivers insurance"; and that the general employer kept the time sheets and collected an agreed hourly rate for the time "put in" at Morgan's. The court in this well considered case held the evidence sufficient for the jury to infer and find that the driver was engaged in the discharge of the appellant's business in the hauling and delivery of the merchandise for hire, that the driver was acting within the scope and course of his employment as a truck driver for the appellant, and that the appellant had not resigned and the Morgan Grocery Company had not taken full and complete supervision and direction of the driver in the driving and the operation of the truck at the time of the accident.

Whether the plaintiff was an employee of the defendant or whether he was an independent contractor was the principal issue in *Benham v. McCoy*.[20] The action was for injuries allegedly received while cutting a wire on the defendant's premises which was alleged to contain electric current. The defendant's evidence tended to show that he was not a carpenter but was in the plumbing and heating business. Wanting to add two rooms to his house and make other alterations, he got in touch with the plaintiff, who had been the foreman in charge of the building of a warehouse for the defendant several years before, and told him what he wanted. They planned the changes and proposed improvements together, and the plaintiff put into sketch form and informed the defendant how the rooms would look when the work was completed. There was evidence that the plaintiff employed two helpers, outlined and directed their work; that the plaintiff worked according to his own choice of hours and days; that defendant was to buy and pay for the materials, pay plaintiff's helpers and pay plaintiff by the hour; that plaintiff made up a list of the materials for the defendant to buy; and that the defendant was in other towns during the time most of the work was done, coming home weekends. The plaintiff's evidence was that he had been a carpenter and cabinet maker for 46 years; that he did not have a contract with the

20. 213 S.W. 2d 914 (Mo. 1948).

defendant; that it was just day work; that he was paid each weekend for the number of hours worked during the week; that the defendant told him approximately what he wanted done; that defendant furnished the material and the plaintiff made out the lumber bills; that he did the work according to what defendant told him; that the defendant gave the instructions and plaintiff tried to follow them; that plaintiff had done very little contracting; that as long as he was not discharged, he was in charge of getting the house up the way the defendant had told him; that he had picked up a man or two to help; that defendant had a pencil sketch and had told him what he wanted done; that defendant was gone practically all the time, but the plaintiff went ahead and did it as nearly as he could; that he worked such hours as he saw fit; and that he followed defendant's instructions on what he wanted accomplished. There was evidence tending to show that the plaintiff outlined and assigned the work to his helpers who worked under his supervision. In affirming a judgment for the defendant, this evidence was held by the court to establish that the plaintiff was an independent contractor. The fact that there was no evidence of any contract to do a fixed piece of work for a fixed price was held not decisive of the question whether one was doing the work as an employee or as an independent contractor.

B. *Res ipsa loquitur*

Whether in a *res ipsa loquitur* case the plaintiff has alleged general negligence or specific negligence was presented in two cases. In *State* ex rel. *Spears v. McCullen*,[21] it was held that an allegation of the petition that plaintiff's automobile was violently struck in the rear by the defendant's street car, which was being operated by the defendant's employee in a negligent manner, was not an allegation of general negligence, but was an allegation of specific negligence. The court said that the specific thing charged is the negligent operation of the street car by a specific person, in that the street car operator was negligent in violently driving the front end of the street car into the rear end of plaintiff's automobile. "The charge is specific in alleging who did it, what was done, the manner in which it was done, the general situation and where it was done." Therefore, an instruction submitting the case on this theory was complete within itself and did not require submission on other acts of specific negligence alleged. If this part of the plaintiff's petition had charged general negligence only and allegations of specific negligence were

21. 357 Mo. 686, 210 S.W. 2d 68 (1948) (*en banc*).

alleged in a subsequent paragraph of the petition, the plaintiff would have had to recover, if at all, on the specific negligence alleged.

To be compared with this case is that of *Welch v. Thompson.*[22] There the petition alleged that a suitcase fell on the plaintiff from a baggage rack while she was riding as passenger in defendant's railroad coach, and that the injuries sued for were directly caused by the defendant's negligence in the maintenance, management, control, and operations of the roadbed, track, train, and rack. This was held sufficient to allege general negligence though insufficiently stating a *res ipsa loquitur* case, but evidence of an extraordinarily violent lurch of the passenger coach almost coincidental with the falling of the suitcase was sufficient to take the plaintiff's case to the jury under the *res ipsa loquitur* doctrine. The defendant contended that evidence of the violent movement of the coach was evidence of specific negligence and, consequently, the submission as a *res ipsa loquitur* case was erroneous. The court said that "the extraordinarily violent lurch 'speaks' of *some kind* of negligence, but does not 'spell out' *the* specific fault." (italics the court's.)

Where the plaintiff introduces evidence tending to show specifically the cause of the accident, the benefits of the *res ipsa loquitur* doctrine will not be lost if by the plaintiff's evidence the cause is still left in doubt or is not clearly shown. In *Mueller v. St. Louis Public Service Co.*,[23] the plaintiff was injured when alighting from the defendant's bus. The bus had been stopped at a regular down town stop, and the exit door opened for the discharge of passengers. Plaintiff testified that as she placed her left foot on the sidewalk and started to draw her right foot out of the exit door, the door closed and caught her leg and foot; that the bus immediately thereafter started up, and she swung around and grabbed hold of a window. She was carried on the outside of the bus in this position for a considerable distance before the bus was brought to a stop and her release effected. While she testified that the bus driver closed the door and started the bus, it further appeared from her testimony that she did not see, and was in no position to see, the bus driver or the controls just prior to and at the time the door closed, nor to know what, if anything, he did in connection with closing the door and starting up. There were other passengers on the crowded bus who were standing in the aisle between the plaintiff and the driver. The court said it was apparent that her statement as to the acts of the bus driver constituted nothing more

22. 357 Mo. 703, 210 S.W. 2d 79 (1948).
23. 214 S.W. 2d 1 (Mo. 1948).

than her conclusions, and that there was no showing of the precise cause as to deprive her of the benefit of the *res ipsa loquitur* doctrine.

To the same effect is the holding in *Belding v. St. Louis Public Service Co.*,[24] where plaintiff sought to recover under the *res ipsa loquitur* doctrine for injuries sustained when the bus on which she was riding suddenly jerked and jolted in an unusual and extraordinary manner, causing her to be thrown to the floor. At the time of the accident she was attempting to make her way through the crowded aisle to the exit door, and was facing toward the rear of the bus. In her testimony she stated that there was a sudden application of the brakes at the time of the "jarring and a jerking," that she heard a "squeaky noise" from the brakes as when a driver of a car attempts to stop quickly, and that "when they put on the brakes the jarring threw me to the floor." Another witness who was standing immediately behind the bus driver facing west (the bus was "northbound") testified that the bus was going along at a fairly good speed and that she heard brakes and felt them. From this evidence the defendant, on appeal from a judgment for plaintiff, contended that the plaintiff demonstrated specific cause of the happening by clearly and definitely ascribing it to the application of the brakes, thus waiving the right to have her case submitted upon the theory of *res ipsa loquitur*. The court pointed out that in relying on that doctrine it is not enough for the plaintiff merely to show "that she had been injured while a passenger on the bus, but in order to establish a basis for an inference of negligence on defendant's part, it was essential that she show what 'occasioned or legally caused the injury', and that such unusual occurrence, whatever it may have been, was something related to defendant and under its management and control." Thus she sought to ascribe the occurrence to the application of the brakes as generally explanatory of the jarring and jerking of the bus which was the basis of the case of *res ipsa loquitur*. However, held the court, she did not go so far as to show any specific act of negligence on the part of the bus driver with respect to the function and application of the brakes; "she did not attempt to show any mechanical defect in the brakes, or an improper maintenance of air pressure, or an improperly applied pressure on the brakes," and thus the true cause was still left in doubt or was not clearly shown. The court distinguished this from a similar type of accident where the plaintiff's daughter testified that she was familiar with the feel of the street car as brakes were being applied and that on the particular occa-

24. 215 S.W. 2d 506 (Mo. 1948) (*en banc*).

sion "the brakes were suddenly jammed on." This was held in that case to have made a case of specific negligence, but no one testified in the instant case to any such familiarity with the "feel" of the brakes. Furthermore, the stop in the earlier case was at a regular stopping point for the discharge of passengers, the court pointing out that "it is obvious that a sudden, violent, and unusual stop at a regular stopping point tends to a far greater degree to show specific negligence of its own force than does proof of a similar stop between regular stopping points, which might be explained as the product of the exercise of care in an attempt to avoid collision with another vehicle."

The doctrine of *res ipsa loquitur* was held applicable in *Cruce v. Gulf, Mobile & Ohio R. R.*,[25] where the plaintiff, a foreman at a coal chute in the defendant railway company's yard, brought the action for injuries sustained when, as he pulled on a rope to lower the pan over the tender of an engine preparatory to coaling, a cable on the chute broke, permitting the pan of the chute to fall upon him. At plaintiff's request the court gave the following instruction: "The Court instructs the jury that if you find and believe from the evidence that it was not the duty of the plaintiff, Hugh Cruce, to inspect, maintain, repair or replace the counter-weight cables mentioned in evidence and that defendant had the exclusive management and control of said cables, then you are further instructed that it was the duty of the defendant to furnish and maintain said cables in a reasonably safe condition for plaintiff to use, and if you also find and believe from the evidence that the breaking of such cable usually and ordinarily occurs only as the result of negligence, then your verdict should be in favor of the plaintiff and against the defendant." On appeal from a judgment for the plaintiff, the court held that this instruction was deficient so as to be prejudicially erroneous in that it did not require a finding of negligence. It only required a finding of facts which would justify an inference of negligence but would not necessarily compel such an inference. The instruction should have required a finding that plaintiff was in fact injured as the result of negligence. The court contrasted this instruction with one which requires a finding of facts which are equivalent to a finding of negligence, in which situation a finding of negligence is not necessary.

C. *Defenses in negligence cases*

Doyel v. Thompson[26] was an action for wrongful death as the result of an automobile-train crossing collision. On the defendant's contention that

25. 216 S.W. 2d 78 (Mo. 1948).
26. 357 Mo. 963, 211 S.W. 2d 704 (1948).

plaintiff was contributorily negligent as a matter of law because he failed to have his automobile under control and to stop, look, and listen at a time and place where he would have avoided the collision, it was held that the deceased had discharged his duty by stopping, looking, and listening for an approaching train at a reasonable place for that purpose. Obstructions to the plaintiff's view along the track and in the direction of the approaching train, beginning at a point approximately 24 feet from the crossing and consisting of stock pens, oil storage tanks and railroad cars standing on a switch track, made it so that no one could see along the track until his line of vision had cleared the nearest box car on the switch track. The car in which the deceased was riding had stopped 6 to 9 feet from the nearest rail of the switch track, which was the first of three tracks, as he approached the crossing, and a window in the car door was put down by the driver of the car that he might listen. Having heard no bell or whistle and not having seen anything that indicated a train was approaching, the driver rolled up the glass in the door, put the car in low gear and started across the track. The court held the fact that the plaintiff did not stop, look, and listen the second time, or did not get out of his coupe and go forward to reconnoiter prior to his actual discovery of the approaching train, did not constitute contributory negligence as a matter of law, the plaintiff being entitled to assume that if a train were approaching he would have heard the statutory warning. The evidence showed that warning signals would have been effectually audible if given. As to the contention by the defendant that the plaintiff was chargeable with seeing the rays of the locomotive headlight as he approached this crossing, the court found that the evidence did not establish that the locomotive headlight was on bright, dimmers being required as equipment on road locomotives by the Interstate Commerce Commission to diminish the light in yards, at stations or when meeting trains.

In *Mullis v. Thompson*,[27] the evidence showed that defendant's train was moving 45 to 55 miles per hour where the city ordinance limited speed to 35 miles per hour, that no whistle was sounded and no bell was ringing, one of which was required by city ordinance, that the plaintiff motorist slowed to five miles per hour, approached to 20 or 25 feet from the main line track, looked both ways, heard no whistle or bell, looked at the "flasher" device maintained by the railroad, which displayed no lights or warning flashes, and that the plaintiff motorist without again looking proceeded to cross,

27. 213 S.W. 2d 941 (Mo. 1948).

although not having a complete view down the main track in the direction of the approaching train, and was struck by the train coming from his left. On this evidence the contributory negligence of the motorist was held to have been properly left to the jury as against the defendant's contention, on appeal from a verdict for the plaintiff, that he was contributorily negligent as a matter of law. The court pointed out that the flasher signal device was there and in part demanding and engaging the plaintiff's attention, and that while "it is not to be said that one in approaching a crossing in the exercise of due care (the highest degree of care in our case) should rely solely upon a signal device—he should use his own senses—yet the flasher signal device, if unlit, was implicit assurance that the crossing could be made in safety."

In the defense of contributory negligence it is only necessary that the defendant show that the negligence of the injured person was one of the concurring causes of the injury in order to defeat recovery, but where the defense of sole cause is used the defendant's negligence must be totally excluded as one of the contributing factors producing the injury. It must show as a matter of law that the accident and injury resulted solely from the negligence of the plaintiff or third person, without any concurrence of defendant's negligence directly contributing thereto. In *Reynolds v. Thompson*,[28] parents brought the action for compensatory damages for the death of their six year old child in a grade crossing collision between defendant's train and an automobile being driven by the mother and in which the child was riding. At the street crossing there was an unobstructed view for a distance of more than 200 feet so that there was nothing to prevent the mother from seeing the train. The automobile collided with the side of the train not any further back than the second coach. There was evidence by several witnesses that the statutory crossing signals by whistle or bell were not given and there was no evidence that the signals were given. The trial court gave a sole cause instruction. The trial court's order, in setting aside the verdict for the defendant and in granting a new trial for error in giving the sole cause instruction, was affirmed since, under the evidence, it would have been reasonable for the jury to have inferred that, had the statutory signals been sounded as required, the mother would have heard and acted to prevent the collision and, therefore, the failure to give the required signals was a direct and contributing cause of the collision and death of the child. The court applied again the Missouri rule that the negligence of one spouse is no bar

28. 215 S.W. 2d 452 (Mo. 1948).

to a recovery by the husband and wife for the death of their minor child against a negligent defendant, no joint enterprise or agency between husband and wife having been shown. In the earlier Missouri decisions establishing this rule the cause of action was brought under the penalty section rather than under the compensatory section as in the instant case, but the court, while observing this difference, held that "the cause of action in the parents in the present case is likewise joint and indivisible until merged into judgment."[29]

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29. In Jackson v. St. Louis-San Francisco Ry., 357 Mo. 998, 211 S.W. 2d 931 (1948), on evidence that the plaintiff motorist stopped, looked, and listened but did not hear or see the approach of the defendant's train, that he then started forward, but on observing the train he immediately applied the brakes but the automobile skidded because of ice and snow and was struck by the train, whether railroad's failure to give the statutory signals was the proximate cause of the collision and whether the motorist was contributorily negligent were for the jury. The defendant had contended that even though it admittedly played a part in causing the injury in failing to give the statutory signals, its negligence was a remote proximate cause and that the ice and snow was a direct intervening proximate cause. A more interesting legal problem in the case arose out of the action by the wife, for and on behalf of their five minor children, brought under both the penal and the compensatory sections of the wrongful death statute. The trial court had instructed the jury that it could return a verdict for the plaintiff on both counts. The jury returned a verdict for $5,000 on the count based on the penalty section and for $10,000 on the count based on the compensatory section. The court held that a plaintiff must make a choice before final submission and elect which of the two damages she would have the jury assess as there can be but a single recovery under but one section of the wrongful death statute. Reeves v. Thompson, 357 Mo. 847, 211 S.W. 2d 23 (1948), was an action by a pedestrian against a railroad for injuries sustained when he was struck at night on a public crossing by defendant's train. The appeal by the defendant from a judgment for the plaintiff turned on whether plaintiff was contributorily negligent as a matter of law in not seeing the train. There was conflicting evidence as to whether or not he was negligent in failing to observe the presence of defendant's slowly moving train in the dark under conditions suggesting that no headlights were burning, and it was held to have been properly left to the jury. In Rembusch v. Prebe, 215 S.W. 2d 433 (Mo. 1948), the case was submitted on primary negligence. The trial court gave the defendant's requested instruction which required the jury to find sole cause on the part of the plaintiff. From a judgment for the defendant, the plaintiff appealed on the ground that the sole cause instruction omitted the "not due to any negligence on the part of the defendant" finding. The court pointed out that since contributory negligence could have been a defense to the action submitted on primary negligence alone, counsel for the defendant was assuming an additional burden arising from giving a sole cause instruction. The court distinguished this situation from a humanitarian submission, or where the plaintiff is a guest, or in any case where contributory negligence cannot be charged against the plaintiff and therefore cannot be a defense. More is required in a sole cause instruction in the latter. In those cases to avoid confusing the jury, it is required that a "not due to the negligence of the defendant" provision be embodied in the sole cause instruction. Since contributory negligence (as well as sole cause negligence of some one other than the defendant) can be a defense to an action based on primary negligence the court said that no sound reason exists to require a sole cause instruction in terms to include a "not due to the negligence of the defendant" clause. Dennis v. Wood, 357 Mo. 886, 211 S.W. 2d 470 (1948), involved two questions: whether plaintiff was a fare-paying passenger in an automobile or

II. TRESPASS

In *Kennedy v. Union Electric Co.*,[30] the action was for damages resulting from the flooding of plaintiff's building. The action was in tort in the nature of trespass, on the theory that impounding waters by the defendant's dam at Bagnell across the Osage River, creating the Lake of the Ozarks, caused great silt deposits in the Osage River and its tributaries at the head of the lake, thus raising the beds of the streams, retarding their flow and resulting in an overflow high enough to flood plaintiff's building. The particular flood was eight feet higher at the place of the injury than any previous flood and, before the dam was built, there had never been an overflow high enough to touch any part of the plaintiff's building. The court found that the height of the water, being so far above the highest previous floods, must have been due entirely either to unprecedented rains or to the conditions created by the defendant's dam and lake or to a combination of both, so as to make a jury case at least on the latter theory. The evidence was found ample of great enough deposits of silt to show a raising of the beds of the Osage and its tributary streams in the upper part of the lake, and that this would raise the water level in these streams, retard the velocity of the water, and cause it to spread out and overflow, for the jury to infer that the excess over previous floods was due to the silting and other conditions caused by the plaintiff's dam and that plaintiff's damage would not have occurred except for such conditions created by the defendant.

One of the principal contentions of the defendant, in its appeal from a judgment for the plaintiff which had been affirmed by the Kansas City Court of Appeals and transferred on defendant's motion to the supreme court "because of the general interest in, and importance of, the issues involved," was that in any event it was only liable for the amount of damage caused by its acts, and, if part of the damage was due to conditions caused by its dam and part by an act of God, plaintiff must prove what proportion was caused by it to recover anything. On rehearing, the court *en banc* recognized that "where part of flood damage would have been caused by an anticipatable overflow, without any obstruction, one who obstructed the stream would not be liable for such part but only for the additional damages

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a guest under a Kansas statute which requires a showing of gross and wanton negligence to recover from the operator or owner of a motor vehicle for injuries received; and whether plaintiff as a fare-paying passenger was contributorily negligent in that she was cognizant of developing danger under the evidence and failed to warn the driver thereof.

30. 216 S.W. 2d 756 (Mo. 1948) (*en banc*).

caused by his obstructions," but "in this case no anticipatable flood would have touched plaintiff's building. . . . Therefore," held the court, "if defendant's obstruction caused the excess, . . . then defendant's act caused all the damage in this case," and the apportionment rule contended for by the defendants did not apply.[31]

III. False Imprisonment

The question in *Snider v. Wimberly*[32] was whether one, who merely states to a police officer what he knows of a supposed offense and expresses an opinion that the plaintiff was the one who had committed the offense, and an arrest was made only after investigation by the officers, has made himself a party to the arrest so as to be charged with false imprisonment. The defendant stopped at his place of business late at night and discovered a man in his office who rushed at him, struck him and escaped by going down the elevator and out a basement window. The defendant called the Kansas City police and his business associate. At the time the defendant discovered the prowler, the only light in the office and vestibule was from street lights and a neon sign which, he said, made it too dark for him to identify the man. Officers of the burglary bureau took charge of the case. It seemed apparent from the course taken by the prowler to escape that he was some one familiar with the premises. There had been previous thefts which had been reported to the police. The names of several employees or former employees were suggested who might answer defendant's description of the man he saw, as to height, size and appearance. The name of the plaintiff, a former employee, was one of those suggested. Later that night, at the request of the police sergeant in charge of the case, a State Highway patrolman went to plaintiff's apartment and made an investigation of the plaintiff. The next night the patrolman went back and asked the plaintiff to accompany him to North Kansas City where he was arrested by the Kansas City police and kept in jail until late the next night, about 24 hours. Before being released, plaintiff gave information about a former employee which resulted in the conviction of that employee for the thefts. On appeal from a judgment for the plaintiff, the defendant contended that this evidence did not show that he caused or instigated the plaintiff's arrest. The court, in reversing the judgment, held that "one who merely states to an officer what he knows of a supposed offense, even though he expresses the opinion that there is ground for an arrest, but

31. For a further analysis of the problem see 4 Mo. L. Rev. 83 (1939).
32. 357 Mo. 491, 209 S.W. 2d 239 (1948), noted in 14 Mo. L. Rev. 217 (1949).

without making any charge, or requesting an arrest, does not thereby make himself liable in an action for illegal arrest.'" One is liable for a false arrest, not made by him or in his presence, if he directed, advised, countenanced, encouraged, or instigated it, but this requires something more than only furnishing wrong information. Here the defendant only said that he thought the plaintiff was the prowler, and in so stating he did not actually make a charge of any offense against the plaintiff or in any way tell the police what to do in the matter. It was merely information calling for the investigation by the police, and the decision to make the arrest by the police was the result of their own investigation.[33]

IV. Defamation

In *Childers v. Nesselroad*,[34] one of the defendants had received an anonymous letter through the mail accusing the defendant, who was a deacon of a church, and other deacons of being thieves and adulterers. The petition alleged that at a church meeting the defendants published "of and concerning plaintiff a written statement containing the false and libelous language that, due to certain statements attributed to Bro. Childers made by various members of the church to the pastor and the board, and on account of disturbance caused by printing and circulating anonymous statements tending to confusion among the membership, the Board of Deacons recommended that a charge of uncooperativeness and promotion of factions be made against the brother and member Ira Childers. . . ." The plaintiff pleaded the innuendo that plaintiff was the author of and responsible for the circulation of the anonymous letter. The petition was held not to state a cause of action, for nowhere in the petition did the plaintiff allege that any person who heard or read the statement had any knowledge of the libelous, anonymous letter. He did not plead that the anonymous letter had been circulated or its contents made known at the meeting in connection with the circulation and publication of the statement. The statement made at the meeting did not charge plaintiff with a crime, directly or indirectly, for it did not disclose the contents of the anonymous letter or, in fact, refer to any letter. The statement made at the meeting in itself was not libelous. To make it so the persons among whom it was circulated must have had knowledge of the anonymous letter and of the contents of that letter, under such circumstances that the

33. For other decisions decided during the year involving aspects of the tort of false imprisonment, see Royal v. Thompson, 212 S.W. 2d 921 (Mo. 1948), and Calloway v. Fogel, 213 S.W. 2d 405 (Mo. 1948).

34. 357 Mo. 1218, 212 S.W. 2d 727 (1948).

readers would understand that the plaintiff was being accused of being the author of the anonymous letter. Such extrinsic facts were necessary to make the alleged statement libelous and the plaintiff should have stated them in his petition.

The plaintiff, in *Jacobs v. Transcontinental and Western Air, Inc.*,[35] had recovered both actual and punitive damages in an action for libel alleged to have been contained in a letter of dismissal sent as interoffice correspondence to two employees of T.W.A., a copy of which was also sent to an association of airline mechanics which plaintiff had unsuccessfully attempted to join. The reasons given in the letter of dismissal were stated as follows: "This action was taken after considering and investigating reports of Maintenance Department Supervisory Personnel to the effect that you have, during your working hours, been neglecting your assigned duties and causing a loss of efficiency on the part of the other employees by unnecessarily loitering in the hallway and in the hangar. We regret that it has been necessary to take this action but it is necessary that all T.W.A. employees attend to their assigned duties in a spirit of willingness and cooperation." In charging him with neglecting his duties, causing loss of efficiency by the other employees, and failing to cooperate, plaintiff asserted as his ground for recovery the words in this "letter were libelous and in defamation of plaintiff's skill, capacity and fitness to perform and discharge his duties as polisher and that said language directly tended to prejudice plaintiff in his trade, business and employment by imputing to him a want of knowledge, skill, capacity and fitness to perform and discharge his duties of his job and were therefore actionable per se." The court, in reversing a judgment for the plaintiff which had been affirmed by the Kansas City Court of Appeals but was transferred to the supreme court because its decision conflicted with a ruling by the Springfield Court of Appeals, held that the words did not impute to him a want of knowledge, skill, capacity, or fitness to perform or discharge the duties of an airplane polisher or mechanic which he claimed as his trade. "The letter," said the court, "did not touch on plaintiff's qualifications or ability to perform his work. In fact it made no reference of any kind to the character or quality of the work performed by him. The charge was that plaintiff had been neglecting his duties which meant in this case that he was not devoting his full time to them. This does not disparage plaintiff's ability and skill to perform his work when he devoted his time to it, particularly since the letter

35. 216 S.W. 2d 523 (Mo. 1948).

goes on to explain the very way he was neglecting his duties." The court also held that the constitutional provision, which states that "in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts," did not in any way affect the power of the court to decide as a matter of law that the statement claimed to be libelous was not capable of a defamatory meaning. Therefore, the trial court should have directed a verdict for the defendant.

V. Fraud and Deceit

The plaintiff's petition, in *Messina v. Greubel*,[36] alleged in substance that the defendants were officers and directors of an insolvent corporation; that plaintiff was an employee of the company, but had no information of its affairs except as furnished him by the defendants; that one of the defendants, owner of nearly all of the stock of the company, with intent to deceive and defraud the plaintiff represented to the plaintiff that the building occupied by the company was free and clear of liens, that the company needed money for working capital only, that the company had $10,000 due it from the United States and that the company was in good financial condition. The petition further alleged that the other defendant joining in misrepresenting the financial condition of the company; that plaintiff, relying upon the representations so made, was induced to invest $18,000 in the capital stock and lend the company $8,000 in the months of January, February and March, 1946; that on March 29, 1946, the company filed a voluntary petition in bankruptcy and plaintiff's investments became a total loss. The plaintiff had judgment in the trial court. On appeal the defendants contended that the plaintiff had no right to rely upon the representations, since the plaintiff by an investigation could have ascertained the true financial condition of the corporation. The court held that the knowledge and means of knowledge of the affairs of the company were vastly superior to that possessed by the plaintiff. The plaintiff was a mechanic and had never owned or operated a business. "He was an employee of defendants and had a right to suspect them of some degree of honesty." It was recognized that plaintiff could have learned something by an investigation, he could have employed an abstractor to search the records to learn if there were liens on the real estate and part of the equipment which defendants falsely represented to be unencumbered, he could have employed an auditor to check the books and to discover that the company owed bills amounting to many thousands of dollars and that, in-

36. 215 S.W. 2d 456 (Mo. 1948).

stead of $10,000 being due from the United States, a balance of more than half that amount was due by the company to the government. The plaintiff was held to have had a right to rely upon these representations which were not so palpably false as to be disbelieved by a person of ordinary intelligence.[37]

VI. Duress

In two decisions the tort of duress was considered. While the court did not find duress to exist in either case, it recognizes the gradual expansion of the doctrine over its original limitations, and that "as a general rule in this country 'the payment of money or the making of a contract may be under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover the money paid, or excuse him from performing the contract.'" However, threats do not constitute actionable duress unless they are wrongful, even though they exert such pressure as to preclude the exercise of free judgment. For a banker, in an effort to collect an outstanding loan made to the plaintiff and a business associate, the note being payable on demand and secured by collateral which the bank was authorized to sell upon the maturity of the indebtedness, to tell the plaintiff that if he did not bring the money to pay off the loan made by the bank by a certain time they would sell the collateral for any price they could get, and "if it is not in here you are going to be paying deficiencies for the rest of your life on this deal," were held by way of dictum, in *Steinger v. Smith*,[38] not to be such threats as to constitute duress.

In *Weisert v. Bramman*,[39] a judgment for the plaintiff was reversed in an action for damages for the value of bonds which the plaintiff alleged had been obtained from her by the duress of a stepdaughter and her husband, by inducing the plaintiff to surrender the bonds in compromising her claims under an ante-nuptial contract. The evidence for the plaintiff showed that there was a reasonable basis for the threat of legal proceeding by the defendants on the ground that plaintiff's possession of the bonds were the result of undue influence over her husband (and father of one of the defendants), and that thereafter plaintiff consummated a compromise agreement with advice of counsel, accepted benefits thereof, and did not claim duress for five

37. Other decisions during the year under review involving aspects of fraud and deceit are Steinger v. Smith, 213 S.W. 2d 396 (Mo. 1948) (no misrepresentation of law or fact), and Durham v. Bill Sullivan Chevrolet Co., 213 S.W. 2d 968 (Mo. 1948).

38. 213 S.W. 2d 396 (Mo. 1948).

39. 216 S.W. 2d 430 (Mo. 1948).

years. The court held there was no basis for a reasonable inference that the plaintiff was bereft of free will and the power of voluntary action as to constitute duress, particularly where she was represented by counsel who conducted negotiations for the compromise agreement with counsel for the other parties extending over a period of several months.

WILLS, TRUSTS AND ADMINISTRATION

GEORGE W. SIMPKINS*

The Supreme Court of Missouri during 1948 decided an unusually large number of cases involving this general subject. They are discussed under the subdivisions: (1) Will Contests; (2) Probate Administration and Powers and Duties of the Probate Court, (3) Contracts to Devise, (4) Construction of Wills and Trusts, and (5) Duties of Trustees. No attempt has been made to cover the cases involving constructive trusts or resulting trusts, since these merely use the form of trusts to prevent unjust enrichment and involve essentially different principles of law than those under discussion.

I. WILL CONTESTS

In three cases wills were contested on the dual grounds of want of testamentary capacity and undue influence. In all three cases the contests were unsuccessful. Like most of such cases the opinions are primarily discussions of the particular fact situations involving elderly (aged 85, 81 and 78) and somewhat infirm testators. In *Ahmann v. Elmore*[1] it was held that a belief, even if mistaken, founded upon reasoning is not an "insane delusion" which will void a will based on such belief. In *Baker v. Spears*,[2] the court ruled that a will was not voided by undue influence in its procurement where the only undue influence proved was the fact that the will was prepared by a person having a confidential relationship to testatrix so as to reinstate himself and another as executors, since this change could not prejudice the heirs or legatees. The mere fact that an aged testator in his will written by himself makes numerous mistakes in spelling and grammar and leaves a will that requires court construction to determine his meaning does not show want of testamentary capacity.[3]

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*Attorney, St. Louis. A.B., Harvard, 1930; J.D., Washington University, 1933.

1. 211 S.W. 2d 480 (Mo. 1948).
2. 357 Mo. 601, 210 S.W. 2d 13 (1948).
3. Adams v. Simpson, 213 S.W. 2d 908 (Mo. 1948).

In re Gartside's Estate[4] decides a case of first impression in Missouri, although the fact situation out of which it arose frequently occurs. A will contest had been settled by a compromise, giving excluded heirs and legatees under a prior will something and reducing the amount otherwise going to the residuary legatee. The court followed the minority rule and held that the Missouri inheritance tax should be assessed according to the amounts actually to be received under the compromise and not according to the amounts which would have been received had the will been carried into effect according to its terms.

II. Probate Administration and Powers and Duties of the Probate Court

State ex rel. *Lipic v. Flynn*[5] discusses the jurisdiction of the probate court in proceedings to discover assets and holds that in such statutory proceedings the probate court has jurisdiction to grant a money judgment even in cases where the alleged wrongful possessor of property had actual possession thereof at the time of the filing of the affidavit of concealment. Accordingly it ruled that the remedy is substantially the same as a suit for trover and conversion in the circuit court. The court, therefore, granted a writ of prohibition against the further prosecution of a suit for trover and conversion in the circuit court where suit therein was filed after citation proceedings had been commenced in the probate court. The court limits the dicta used in *Davis v. Johnson*,[6] where it had been stated that a suit for trover and conversion was purely possessory and did not involve title, holding that in both citation proceedings and such suits title may be involved.

In a suit to set aside a conveyance by the deceased as a fraud on creditors, the court first ruled that in any case the plaintiff could not prevail because there was an adequate consideration for the conveyance. It then continued by way of dicta that in such suit a court of equity could determine independently whether or not deceased was in fact indebted to plaintiff and is not bound by the allowance of plaintiff's claim in the probate court.[7]

In *State* ex inf. *Kell vs. Buchanan*,[8] suit was brought to obtain a declaration that certain real estate had escheated to the state because deceased had died without heirs. The probate court had not ordered the administra-

4. 357 Mo. 181, 207 S.W. 2d 273 (1948).
5. 215 S.W. 2d 446 (Mo. 1948).
6. 332 Mo. 417, 58 S.W. 2d 746 (1933).
7. Chrisman v. Zeysing, 209 S.W. 2d 144 (Mo. 1948).
8. 357 Mo. 750, 210 S.W. 2d 359 (1948).

tor to take charge of the real estate. For this reason, the supreme court held that an order determining heirship and directing distribution was not res adjudicata. A similar ruling was made with respect to an order determining heirship as a basis for determining that no Missouri Inheritance Tax was due and no Missouri Inheritance Tax Appraiser should be appointed. The court reiterates its ruling in earlier decisions[9] that the probate court in connection with inheritance tax matters acts in an administrative and not a judicial capacity.

The old ruling of *Estate of Williams*[10] of the court of appeals was for the first time judicially sanctioned by the supreme court in *In re Phillips' Estate*,[11] where it was held that the giving of bond, although required by statute, was not jurisdictional in connection with appeals from the probate court to the circuit court.

Where an insane ward died after the probate court had approved a particular sale of his real estate, but before the guardian had actually executed the deed, it was ruled that a court of equity should direct the guardian to convey the property to the purchaser. In this case of first impression in Missouri, the court follows the established Missouri rule that equitable title passes when, but not until, the probate court approves the sale. However, it expressly leaves undecided the question of the right of the guardian to execute such a deed after the ward's death unless directed so to do by a court of equity.[12]

III. Contracts to Devise

A husband and wife executed a joint will containing a provision allowing changes by mutual consent and providing that after the death of the survivor all the property of either of them should pass to a trust created under the will. After the death of the wife, the husband bought $30,000.00 Series G U. S. Government Bonds, naming his three children as beneficiaries. As a result of a suit in equity, the court ruled that the three beneficiaries must surrender the bonds to the U. S. Treasury for redemption, obtain their cash value and pay it over to the executor of the husband's estate to become part of the trust. The court recognizes that it cannot direct a transfer of the bonds to the executor since this would be contrary to the regulations of

9. De Pauw University v. Brunk, 53 F. 2d 647 (D.C. W.D. Mo. 1931), *aff'd* 285 U.S. 527 (1931); In re Bernero's Estate, 271 Mo. 529, 197 S.W. 121 (1917).
10. 62 Mo. App. 339 (1895).
11. 357 Mo. 947, 211 S.W. 2d 728 (1948).
12. Capelli v. Bennett, 357 Mo. 421, 209 S.W. 2d 109 (1948).

the Treasury Department but achieves a similar result by its judgment in personam against the beneficiaries.[13]

Hardy v. Dillon[14] reiterates the long established rules with respect to covenants to devise and refuses specific performance because the services involved "were not exceptional and substantial, personal, filial, or arduous and menial, and could readily and easily be measured and compensated in money. . . ."

IV. Construction of Wills and Trusts

In *Atlantic National Bank v. St. Louis Union Trust Co.*,[15] the court held void ab initio as testamentary in character a trust created by an instrument executed in 1898 and duly accepted by the trustees in the same year. Under the indenture the grantor retained, not only the right to revoke, but also the right to use, occupy and enjoy all of the trust property during his lifetime. On his death it was provided that the trustees shall forthwith take, hold, manage, and control the trust estate. Grantor prior to his death in 1900 had treated the property substantially as his own. It was ruled that the wording of the instrument and conduct of the grantor showed that there was no intent in 1898 to vest a then present title in the trustees. Estoppel could not breathe life into a trust void ab initio since the surviving corporate trustee had not changed its position in any manner adverse to itself in its corporate capacity in reliance on the acts of the deceased who had been individual trustee since 1900 and would if the trust was void be entitled to all of the property outright. Despite the long lapse of years, the Statute of Limitations did not bar the action since it would not apply in a suit against the trustee of an express trust, even if the trust was in law void ad initio.

Altman v. McCutchen[16] reiterates and applies the settled rule that a will is valid if it fixes the general class of charities which are to receive a bequest and leaves the executor power to select the particular charities. Although the rule itself is clear, the case contains a valuable review of its application to particular testamentary provisions.

Clark v. Mississippi Valley Trust Co.[17] holds that, where a will and codicil as construed by the court granted a trustee discretion to encroach upon the corpus of a trust estate to pay necessary medical expenses of the

13. Union National Bank v. Jessell, 215 S.W. 2d 474 (Mo. 1948).
14. 207 S.W. 2d 276 (Mo. 1948).
15. 357 Mo. 770, 211 S.W. 2d 2 (1948).
16. 210 S.W. 2d 63 (Mo. 1948).
17. 357 Mo. 785, 211 S.W. 2d 10 (1948).

beneficiary and where the beneficiary had in fact paid such expenses out of his own pocket, such beneficiary could recover the amount thereof from the trust estate. It follows the rule of *St. Louis Union Trust Co. v. Kaltenbach*[18] that in cases where a plaintiff in a will construction suit is suing primarily for his own benefit, he is not entitled to an allowance out of the corpus of the trust estate to pay his attorney's fees.

The ever troublesome question whether particular language creates vested or contingent remainders was before the court in three cases.[19] In two of these the remainders were held vested,[20] and one contingent.[21] In two cases the court was called to construe wills which the testator had obviously drawn himself.[22] In one case the court considered the complicated provisions of the will of a businessman disposing of his individually owned business and making provisions for its management.[23] All of these cases turned upon the particular wording of the instruments in question and are of relatively little value as precedents unless a subsequent will should contain substantially similar language.

V. Duties of Trustees

Bilton v. Lindell Tower Apartments[24] illustrates the lengths to which the doctrine of full disclosure is carried when a trustee is dealing with trust beneficiaries. In this case a plan for the extension of bonds was set aside because of the failure of the voting trustees for stock of the corporation to reveal the full amount of bonds which were owned by a syndicate which owned all of the stock and to state that the stockholders were financing the campaign to obtain an extension of the bonds and had promised to pay the fees of the stock trustees. The result was doubtless influenced by the fact that two of the three stock trustees were originally appointed to represent the bondholders, while the third trustee had been originally appointed to represent the stockholders. The failure to reveal occurred in a series of letters

18. 353 Mo. 1114, 186 S.W. 2d 578 (1945).
19. Grannemann v. Grannemann, 210 S.W. 2d 105 (Mo. 1948); Harlow v. Benning, 357 Mo. 266, 207 S.W. 2d 471 (1948); Coley v. Lowen, 357 Mo. 762, 211 S.W. 2d 18 (1948).
20. Grannemann v. Grannemann, Harlow v. Benning, *supra* n. 19.
21. Coley v. Lowen, 357 Mo. 762, 211 S.W. 2d 18 (1948).
22. Adams v. Simpson, 213 S.W. 2d 908 (Mo. 1948); Smoot v. Harbur, 357 Mo. 511, 209 S.W. 2d 249 (1948).
23. Cockrell v. First National Bank of Kansas City, 357 Mo. 894, 211 S.W. 2d 475 (1948).
24. 213 S.W. 2d 952 (Mo. 1948).

from the stock trustees to the bondholders urging the bondholders to consent to the extension.

On the other hand, although officers and directors of a corporation ordinarily are fiduciaries for the corporation and cannot purchase assets for themselves individually which it is their duty to buy for the corporation, this doctrine did not prevent the vice president and owner of 50% of the stock of a corporation, which corporation is the lessee of a motion picture theatre under a lease about to expire, from buying for her individual account the theatre when it had become apparent that the president and owner of the other 50% of the stock was trying to buy the theatre for his own account.[25]

25. Hyde Park Amusement Co. v. Mogler, 214 S.W. 2d 541 (Mo. 1948).

THE NEW GENERAL CODE FOR CIVIL PROCEDURE AND SUPREME COURT RULES INTERPRETED[1]

CARL C. WHEATON*

OBJECTIVES OF CODE

The objectives of the code have been expressed in different forms. Thus the Kansas City Court of Appeals has recently said that it was profoundly conscious of the intent of the new Code of Civil Procedure to liberalize and to simplify the method of procedure in our trial and appellate courts.[2] On the other hand, the supreme court has said that the purpose of the new code and supreme court rules are to promote the orderly administration of justice and to seek the just, speedy, and inexpensive determination of every action.[3] It has also stated that, considering the code as a whole, it is clear that it was intended to promote the orderly administration of justice and the just, speedy, and inexpensive determination of every action. Notice and a hearing, or an opportunity to be heard, have long been considered essential to due process, to a decision on the merits of a cause and to the deprivation of rights and property. The Code of Civil Procedure was not intended to conflict therewith.[4]

The spirit of the code and rules has led the supreme court to hold that only in exceptional cases could an action be justly disposed of by dismissing a meritorious appeal.[5]

CASES COVERED BY THE CODE

By the provisions of Section 2 of the civil code of which code Section 85 is a part, the procedure to be governed by said civil code is expressly and specifically limited to that "in the supreme court, court of appeals, circuit courts and common pleas courts." There is no mention whatsoever of Magistrate Court in said Section 2.

The reason that the legislature did not mention Magistrate Court in said Section 2, *supra*, of the Civil Code is obvious. Said Magistrate Court was not in existence when the code was enacted. It was not created until more

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*Professor of Law, University of Missouri. A.B. 1911, Leland Stanford University, LL.B., 1915, Harvard University. Draftsman for the Missouri Supreme Court Committee on Civil Practice and Procedure.

1. These interpretations are based on Volume 209 through 219 of Southwestern Reporter, second series.
2. Bank of Thayer v. Kuebler, 219 S.W. 2d 297 (Mo. App. 1949).
3. Johnson v. Kansas City Public Service Co., 214 S.W. 2d 5 (Mo. 1948).
4. Bindley v. Metropolitan Life Ins. Co., 213 S.W. 2d 387 (Mo. 1948).
5. Baldwin v. Desgranges, 199 S.W. 2d 353 (Mo. 1947).

than a year after the Civil Code went into effect. The Civil Code according to Section 3 thereof went into effect January 1, 1945. The Act creating the Magistrate Court, Mo. Laws 1945, page 765 *et seq.*, Mo. Rev. Stat. Ann. § 2811.101 *et seq.*, did not go into effect until March 11, 1946, as to certain sections, and January 1, 1947, as to other sections.[6]

Distinction Between Actions in Law and Equity

Sections of the new code providing that it shall be construed to secure just, speedy, and inexpensive termination of every action and that there shall be but one form of action to be known as "civil action" does not eliminate all distinctions between an action in equity and an action at law.[7]

Notice

Motions to dismiss for lack of jurisdiction, improper venue, or failure to prosecute require notice where the party against whom they are directed is not in default for failure to appear.[8]

Extending the Time for Doing Specified Acts

A court may not enlarge the period for filing a motion for or granting a new trial, or for commencing an action or for taking an appeal.[9] However, in a case in which a transcript was filed with the Kansas City Court of Appeals after the period of the last permissible extension of time for filing it and more than six months from the date of the filing of the notice of appeal, where the delay in filing was claimed to be caused by inability of the appellant to obtain necessary exhibits from the respondent, the court said, "Supreme Court Rule 3.26 prohibits the trial court from extending the time for filing of transcripts beyond six months from the date the notice of appeal was filed. . . . Under Supreme Court Rule 1.05, appellants could have sought a stipulation permitting the omission of the exhibits referred to from the transcript and the filing of the same separately in this court on or before the setting of the case for hearing. If he had failed to obtain such stipulation he could then under Rule 1.30, have applied to this court for an extension of time for the filing of the transcript, after the expiration of the six months' period below, and upon proper notice to his adversary.

"As the record now stands, the appeal is not invalid, but this court, under Rule 1.30, is authorized, in its discretion, to dismiss the appeal. The

6. State v. Sestric, 216 S.W. 2d 152 (Mo. App. 1948).
7. Krummenacher v. Western Auto Supply Co., 217 S.W. 2d 473 (Mo. 1949).
8. Bindley v. Metropolitan Life Ins. Co., *supra* note 4.
9. Bank of Thayer v. Kuebler, 218 S.W. 2d 297 (Mo. App. 1949).

question remains whether, under all the circumstances shown, we should decline to consider the merits of the appeal and to rule that the appeal has been forfeited, or permit the appeal to stand and consider the transcript as if timely filed. Rule 1.15 authorizing suspension of certain rules of procedure pertaining to appeals does not appear to relate to the requirements fixing the periods within which the transcript shall be filed in the trial court or appellate court. Rule 1.28, however, requires all the rules to be 'liberally construed to promote justice, to minimize the number of cases disposed of on procedural questions and to facilitate and increase the disposition of cases on their merits.' We take it that under that rule we may, if circumstances warrant, and justice under the conditions would thereby be promoted, and under the further provision of Rule 1.30, decline to dismiss the appeal and proceed to hear the cause on its merits.

"While the evidence before us on the motion to dismiss the appeal shows positively that the appellants did not comply with the code provisions in regard to the time within which the transcript must be filed, and did not avail themselves of the remedies afforded them in such cases by the code and the rules, it, however, does appear that they made an honest effort to obtain the necessary exhibits for the transcript and did consult the code and rules of court, although erroneously construing them and overlooking some of their vital provisions. On the other hand, the evidence clearly indicates that during the period when the transcript must have been in preparation the counsel for respondent had possession of some of the exhibits desired to be shown therein and left the city without making them available to the appellants for such purpose. The perfection of an appeal may thus be seriously retarded, and the appellants and the courts thereby may be unnecessarily burdened with consequent proceedings arising out of such delay in the transcript. The delay was, in part, due to circumstances under the control of the party now objecting, and she was not misled or harmed in anywise by the irregularity. Upon serious consideration of all the peculiar facts in the matter before us we are unwilling to rule that the appellants' benefits of appeal has thus been forfeited, and will consider the transcript as if timely filed."[10]

The Springfield Court of Appeals, in following the spirit of this decision, stated, "This rule [Supreme Court Rule 3.26] is supplemental to Section 138 of the Civil Code of Missouri . . . The transcript was filed in this court . . .

10. Costello v. Goodwin, 210 S.W. 2d 375 (Mo. App. 1948).

considerably more than six months after the date of the filing of the notice of appeal. No application was made to this court, as could and should have been done under the provisions of Sec. 6, par. (b) of the Civil Code of Missouri.

"However, the case has been briefed and submitted by all parties and no question has been raised as to the timely filing of the transcript. While under this state of the record, we would be justified in dismissing the appeals under Sec. 129, Civil Code of Missouri, Mo. R.S.A. § 847.129, Supreme Court Rule 1.30, we have decided, notwithstanding, to determine the case upon its merits."[11]

The court term is no longer considered in computation of time in such matters under Sec. 6 (c) of the new code.[12]

Terms of Court

Under our civil code terms of court are continuous, there being no interval or vacation period between terms, as provided by Section 9 thereof.[13]

Supreme Court's Power to Harmonize Procedural Statutes

The new civil code vested the supreme court with "power to promulgate rules necessary to harmonize" the provisions of said code and also other statutes relating to Civil Procedure.[14] This authority has been exercised in Supreme Court Rule 3.

Parties

a. *Joinder of*

Where two persons were claimed to have been killed by the same negligent act of the defendant, it has been held that their administrator might, under Sections 16 and 37 of the General Code for Civil Procedure, join causes of action for their deaths in a single law suit. The defendant argued that, since the suit was for the death of two persons, and since there is no cause of action at common law for the death of a person but that such cause exists only by statute, the death is the occurrence which gives rise to the cause of action for death and not the defendant's negligence. He claimed, therefore, that the two deaths could not arise out of the same occurrence and that the two claims for the deaths could not be joined. The court rejected this argu-

11. Morris Plan Co. of Kansas v. Jenkins, 216 S.W. 2d 160 (Mo. App. 1948).
12. Bank of Thayer v. Kuebler, *supra* note 9.
13. State *ex rel.* Grace v. Connor, 219 S.W. 2d 867 (Mo. App. 1949).
14. Johnson v. Kansas City Public Service Co., 214 S.W. 2d 5 (Mo. 1948).

ment and held that the defendant's negligence was the occurrence involved. The court held further that Section 16 was merely permissive.[15]

b. *Interpleader*

Section 18 of the General Code for Civil Procedure extends the scope of interpleader and bills in the nature of interpleader.[16]

The office of the equitable interplea is not to protect a party against a double liability, but against double vexation in respect to one liability.[17] If the right to maintain interplea turns on a dispute of fact, the court may ascertain whether such dispute is real and substantial or merely feigned and colorable. Where the asserted claim of the third person is frivolous or invalid, the interplea should be denied.[18]

Where a real estate agent had $300 which had been paid to him by the purchaser pursuant to a contract for the sale of certain property, and the money was thereafter claimed by both purchaser and vendor upon the sale falling through, the agent had the right to file an interpleader to have the court say who was entitled to receive such fund.[19] Where a fund is paid into court and claimed by different parties, each of these parties, by his interplea, is in effect a plaintiff, he must recover upon the strength of his own title and not upon the weakness of that of his adversarys, and, if he is not entitled to the award himself, he is in no position to complain that it was awarded to some one else.[20]

c. *Third-Party Practice*

It has been said that the general purpose of Section 20 of the General Code for Civil Procedure is "to avoid two actions" and "to accomplish ultimate justice for all concerned with economy of litigation and without prejudice to the rights of another."[21]

There is no limitation on the types of actions to which the third-party practice statute applies.[22]

Where the motion for leave to file a third-party petition is made after the filing by the defendant of his answer, notice of the motion must be given to the plaintiff.[23]

15. Fair v. Thompson, 212 S.W. 2d 923 (Mo. App. 1948).
16. Barr v. Snyder, 219 S.W. 2d 305 (Mo. 1949).
17. *Ibid.*
18. *Ibid.*
19. Roberts v. Griggs, 210 S.W. 2d 753 (Mo. App. 1948).
20. Denton Gin Co. v. Gathings, 216 S.W. 2d 959 (Mo. App. 1949).
21. State *ex rel.* McClure v. Dinwiddie, 213 S.W. 2d 127 (Mo. 1948).
22. *Ibid.*
23. Dennis v. Creek, 211 S.W. 2d 59 (Mo. App. 1948).

The granting of a motion of the original defendant to implead a new third-party defendant is within the court's discretion.[24] However, the court has the duty to exercise that discretion when a proper motion is made for leave to bring in a third-party defendant.[25]

When a third-party defendant is brought into a case, it is optional with the plaintiff whether or not he will make the new party a defendant.[26] But the plaintiff cannot have a judgment against the third-party defendant unless he amends his petition and asserts a claim against such defendant.[27]

If the third-party defendant is thus accepted by the plaintiff as a defendant, he may assert all his defenses to the claims against him and he is bound by all adjudications of liability which may be made in the judgment.[28]

The third-party practice statute does not change the substantive law respecting contribution between joint tort feasor judgment debtors. There can be no contribution under this practice unless the plaintiff accepts the third-party defendant as his own defendant and obtains a joint judgment against him and the original defendant.[29]

d. *Intervention*

The trial court, after allowing an appeal in a named case had no jurisdiction to make an order sustaining an application to intervene, and there could be no error predicated upon its action in refusing to make it.[30]

Service of Summons

Service of minors by delivering a copy of the summons on their legal guardian is good service. Section 27 (b) of the civil code says: "If the infant . . . has a legally appointed guardian . . . by serving a copy of the summons and of the petition on said guardian. . . ." Supreme Court Rule 3.09 says: "A summons containing only the names of the defendant or defendants or other parties to be personally served . . . together with a copy thereof and a copy of the petition for each defendant *or person to be served,*

24. Browne v. Creek, 209 S.W. 2d 900 (Mo. 1948); State *ex rel.* McClure v. Dinwiddie, *supra* note 21; Dennis v. Creek, 211 S.W. 2d 59 (Mo. App. 1948).
25. State *ex rel.* McClure v. Dinwiddie, *supra* note 21.
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*
29. State *ex rel.* McClure v. Dinwiddie, *supra* note 21; Phegley v. Graham, 215 S.W. 2d 499 (Mo. 1948).
30. City of St. Louis v. Silk, 199 S.W. 2d 23 (Mo. App. 1947).

shall be delivered to the officer or other person who is to make the service." Under Section 27 (b), if the infant has a legally appointed guardian, the guardian is the person to be served and to whom the summons and petition must be delivered. Section 27 (a) provides the manner of service on an infant who has no legal guardian, but the law does not require delivery of copies to an infant who does have a legal guardian nor multiple copies to a guardian who represents more than one infant.[31]

An element of good faith underlies service on an unknown party. The ignorance of his name must be real, and not willful, ignorance, or such as might be removed by mere inquiry, or by a resort to means of information. The very basis of the statutory procedure against unknown parties is that parties so proceeded against are in fact unknown. If the reason they are unknown is merely because the plaintiff does not take the trouble to inquire into the question of their identity, the failure to make the inquiry defeats the right to invoke the statute.[32]

The special appearance of a defendant does not confer on the court jurisdiction of his person or waive jurisdictional defects.[33]

A court is not authorized to enter a personal judgment against a defendant who is served by publication and who does not appear.[34]

Pleadings

a. *Technical Forms not Required*

Where *A* is the administrator of the estates of *B* and *C*, a title to a petition describing the plaintiff as "*A*, Administrator of the estate of *A*, deceased, and *B*, deceased, for and on behalf of . . ." (here were inserted the names of the heirs of *A* and *B*) was held sufficient.[35] It was held, further, that an instruction defining the form of the verdict for a singular plaintiff instead of in the plural was not improper where the form of the action otherwise complied with the statutory requirements prescribing forms of pleadings.[36]

Though a petition did not use the word "converted" in alleging a conversion, it was sufficient if it alleged facts which, in law, amounted to a conversion.[37]

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31. New York Life Ins. Co. v. Feinberg, 212 S.W. 2d 574 (Mo. 1948).
32. Martin v. McCabe, 213 S.W. 2d 497 (Mo. 1948).
33. Beckmann v. Beckmann, 218 S.W. 2d 566 (Mo. 1949).
34. *Ibid.*
35. Fair v. Thompson, 212 S.W. 2d 923 (Mo. App. 1948).
36. *Ibid.*
37. Hussey v. Ellerman, 215 S.W. 2d 38 (Mo. App. 1948).

b. *Setting Forth Claims for Relief*

The code requires a statement of the constitutive facts, not the conclusions of the pleader, showing claimant entitled to relief, as well as a demand for judgment for the relief desired.[38]

Where a complaint in unlawful detainer action sets out specific facts showing the defendant tenant to be holding over wrongfully after termination of a lease, the words "illegally" or "unlawfully," if inserted in the complaint, would merely state a conclusion and were unnecessary.[39]

In an action to recover for negligent injury, a petition which charged "negligence and carelessness," together with an allegation that the plaintiff's injury was the direct and proximate cause of such negligence and carelessness, was held, in connection with the other circumstances set forth, to be good after verdict in the absence of any attack thereon. The allegation of negligence and carelessness was said to be an allegation of fact rather than a mere legal conclusion.[40]

c. *Replies*

Where a circuit court permitted a wife to file a cross-bill for divorce out of time and ruled against the contention of her husband that the court had lost jurisdiction because of the circuit clerk's void order dismissing the husband's divorce action on motion of the husband without an order of court, the circuit court should then have first ordered the husband to file a reply to the cross-bill before foreclosing the husband's right to defend against the cross-bill by entering a default judgment.[41]

d. *Joinder of Claims*

One may in either a petition or counterclaim, join actions at law and in equity.[42]

In counterclaims, whether in the defendant's answer or in the plaintiff's reply, one may plead independent or alternate claims, and may join as many claims as he has.[43]

However, Section 61 (g) of the code recognizes that some actions can not be joined.[44]

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38. Foster v. Pettijohn, 213 S.W. 2d 487 (Mo. 1948).
39. Folger v. Lowery, 210 S.W. 2d 1011 (Mo. App. 1948).
40. Holtz v. Daniel Hamm Drayage Co., 209 S.W. 2d 883 (Mo. 1948).
41. State *ex rel.* Grace v. Connor, 219 S.W. 2d 867 (Mo. App. 1949).
42. Krummenacher v. Western Auto Supply Co., 217 S.W. 2d 473 (Mo. 1949); State *ex rel.* Fawkes v. Bland, 210 S.W. 2d 31 (Mo. 1948).
43. State *ex rel.* Fawkes v. Bland, *supra* note 42.
44. *Ibid.*

e. *Affirmative Defenses*

The defenses of contributory negligence,[45] of failure of consideration,[46] and of the statute of limitations[47] are affirmative.

f. *Multiple Statements of Claim*

The plaintiff in different paragraphs of her petition alleged general and specific negligence of the defendant. She claimed that Section 42 of the General Code for Civil Procedure permitted her to do this and still to recover under the doctrine of res ipsa loquitur. The court, in rejecting this claim, said, "The provisions of Section 42, supra, were not, as we view them, ever intended to authorize a party to combine in one petition a charge of general negligence with one of specific negligence, and then have the court ignore the charge of specific negligence by submitting the case to the jury on general negligence. . . . When plaintiff went so far as to include in her petition allegations which definitely pointed out a particular servant of defendant and specified the particular acts which he committed as the negligence which caused her injuries, her right to rely on general negligence went out of the case."[48]

g. *Inconsistent Pleadings*

Where the plaintiff's petition alleged that the contract sued on was an oral contract, an answer including general and special denials and stating that the oral contract "as alleged" or "as set out" would be ineffective because not in writing and unfair and unconscionable did not necessarily admit that the alleged contract existed as a fact; and there was no such absolute incompatibility within the law of pleadings between the denials and the affirmative defenses as would cause the latter to destroy the former.[49] Nor was it inconsistent for the appellant to deny that she had violated the ordinance and also assert that the ordinance is invalid.[50]

A motion to strike or to elect is the proper remedy for inconsistent defenses, and, in the absence of such motion, the objection is deemed waived.[51]

h. *Allegation of Fraud*

Though, in a petition to set aside a deed, there was no express statement that the defendant acted fraudulently, as the facts therein pleaded

45. Pulse v. Jones, 218 S.W. 2d 553 (Mo. 1949).
46. Minto v. Minto, 217 S.W. 2d 729 (Mo. App. 1949).
47. Hauber v. Gentry, 215 S.W. 2d 754 (Mo. 1948).
48. Hoeller v. St. Louis Public Service Co., 199 S.W. 2d 7 (Mo. App. 1947).
49. Feiden v. Gibson, 218 S.W. 2d 105 (Mo. 1949).
50. City of St. Louis v. Friedman, 216 S.W. 2d 475 (Mo. 1949).
51. Feiden v. Gibson, *supra* note 49.

tended to show want of consideration for the deed and an abuse of the confidential relationship between the plaintiff and the defendant, fraud was sufficiently pleaded.[52]

i. *Construction*

Since pleadings shall be construed as to do substantial justice, it is not at all material where in a petition an allegation of negligence appears. Whether it may appear, for instance, in the third paragraph or in a subdivision of the fifth, or in any other paragraph, is of no consequence. The petition as a whole must be considered and none of its charging parts can be ignored.[53]

A pleading should be construed on appeal with reasonable liberality to prevent entrapment unless it wholly fails to state a cause of action.[54]

Where a husband, in an action for malpractice, alleged that his wife died as a direct result of the defendant doctor's omissions and misconduct, it does him substantial justice to interpret his petition as admitting that his only claim for recovery is based upon the wrongful death statute and not upon the personal wrong of malpractice. Hence, it was proper to dismiss his action since it was barred by the statute of limitations applicable to the statute.[55]

j. *Demurrers Abolished*

Demurrers in civil practice have been abolished.[56] Motions take their place.[57]

k. *Amendments to Pleadings*

A trial court may now permit a plaintiff to file any number of amendments which, in the opinion of the court, justice requires.[58] However, under the new code a party does not have the right, as a matter of law, to file an amended petition after a motion to dismiss on the ground of failure to state a cause of action has been sustained. This is true since Section 101 of the code provides that a dismissal with prejudice operates as an adjudication upon the merits, and any involuntary dismissal other than one for lack of jurisdiction or for improper venue shall be with prejudice unless the court in

52. Frey v. Onstott, 210 S.W. 2d 87 (Mo. 1948).
53. State *ex rel.* Spears v. McCullen, 210 S.W. 2d 68 (Mo. 1948).
54. Rogers v. Poteet, 199 S.W. 2d 378 (Mo. 1947).
55. Baysinger v. Hanser, 199 S.W. 2d 644 (Mo. 1947).
56. Baysinger v. Hanser, *supra* note 55; Jones v. Williams, 209 S.W. 2d 907 (Mo. 1948); State *ex rel.* Uthoff v. Russell, 210 S.W. 2d 1017 (Mo. App. 1948).
57. Baysinger v. Hanser, *supra* note 55; State *ex rel.* Uthoff v. Russell, *supra* note 56.
58. Jones v. Williams, *supra* note 56.

its order for dismissal shall otherwise specify. Therefore, if a plaintiff desires to file an amended petition, it is up to him to ask leave to do so.[59]

If an amended petition is filed, the original petition is deemed to have been abandoned.[60]

l. *Counterclaims*

Section 73 of the General Code for Civil Procedure is only a procedural statute and it does not change the substantive law as to what constitutes a cause of action or when it accrues.[61]

Though Section 1516 of the Revised Statutes of Missouri permits the defendant in a divorce suit to file an answer charging the plaintiff with conduct which would entitle the defendant to a divorce and further provides the defendant in the answer "*may*" pray for a divorce, this is only permissive, not mandatory. But Section 1515 contains the provision so often heretofore referred to, that "the like process and proceedings shall be had in such causes as are had in other civil suits." This clause is general, and means that the process and proceedings shall conform to the civil code as it exists from time to time. It therefore includes the new Code of 1943.

Under authority of Section 10 of the new code the supreme court adopted in 1944 supplementing and harmonizing Rule 3.02 (a), which provides, in part, that if "any special procedural statute refers to or adopts the provisions of the Code of Civil Procedure, and also refers to a particular method of procedure which has been changed by the Civil Code, then and in that event, the substitute procedure prescribed by the revised Civil Code shall be employed." This rule refers to two statutes in pari materia, as well as to a single statute. In other words, Section 1515 adopts the general and new code of procedure, therefore the particular provision in Section 1516, giving the defendant an option as to filing a cross-action for divorce, must yield to the mandatory provision of Section 73 in the new code—unless this provision of Section 1516 is protected by the exceptive phrase "unless otherwise provided by law," appearing in Section 2 of the new code.

Section 2 does continue Section 1516 in force as to divorce, and the defendant still retains the optional right granted by Section 1516 to file a cross-bill for divorce, or not, notwithstanding the compulsory provision of Section 73 of the new code. That right is more substantive than procedural;

59. Jones v. Williams, *supra* note 56; Husser v. Markham, 210 S.W. 2d 405 (Mo. App. 1948); Mansfield v. Veach, 212 S.W. 2d 90 (Mo. App. 1948).
60. Standley v. City of Van Buren, 217 S.W. 2d 711 (Mo. App. 1949).
61. Zickel v. Knell, 210 S.W. 2d 59 (Mo. 1948).

and it can hardly be thought the new code intended to *compel* the innocent and injured defendant in such a suit to file a cross-action for divorce and seek to sever the marital relation, or else waive the right altogether.

But the same conclusion does not follow by analogy with respect to separate maintenance. It is true Sections 3376 and 3382 conferring that right are permissive. But they are very general, and wholly unlike Section 1516 in the divorce law. Section 3382 merely adopts the general practice in civil suits. There is nothing to the contrary anywhere in the chapter. The claim seeks only a money judgment, not a severance of the marital relation—thereby coming partly but not wholly within the scope of a divorce case. Where a husband has instituted the divorce litigation and the wife merely files a defensive answer, if he prevails she will be entitled to nothing, whereas if she prevails the marriage relation will still exist and he will be legally bound to provide maintenance for her. She chooses the battle ground. If she elects merely to contest his divorce and preserve the marital status, undoubtedly her right to separate maintenance is within the subject matter of the divorce suit. It clearly comes under the requirement of Section 73 of the new code, the objective of which is to discourage separate litigations covering the same subject matter, and to require their adjudication in the same action.[62]

Judicial Notice

Where it appeared in the plaintiff's pleadings that the collision which gave rise to his cause of action occurred in Kansas, judicial notice of the applicable Kansas laws should be taken, though neither party specifically pleaded Kansas law.[63]

Motions

a. *Motions to Dismiss Petitions*

A motion to dismiss a petition for failure to state a claim upon which relief can be granted when that objection appears upon the face of the petition.[64] For example, such is proper where the defense of the statute of limitations,[65] or that of the statute of frauds[66] appears on the face of the petition.

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62. State *ex rel.* Fawkes v. Bland, *supra* note 42.
63. Hall Motor Freight v. Montgomery, 212 S.W. 2d 748 (Mo. 1948).
64. State *ex rel.* Uthoff v. Russell, *supra* note 56; City of St. Louis v. Butler Co., 219 S.W. 2d 372 (Mo. 1949).
65. Baysinger v. Hanser, *supra* note 55.
66. State *ex rel.* Uthoff v. Russell, *supra* note 56.

b. *Waiver of Objections Available by Motion*

A party waives objections available to him by motion by failure to assert the same by motion with the exceptions noted in Section 66 of the General Code for Civil Procedure.[67] This has been held in connection with inconsistency in pleadings[68] and with lack of particularity in allegations.[69] However, under Section 66, entering into trial does not waive an objection properly raised by motion.[70]

c. *Motion for Judgment on the Pleadings*

No evidence is heard on a motion for judgment on the pleadings. Such a motion, for the purpose of the motion, admits the truth of all facts well pleaded by the opposite party. If an issue of fact is presented by the pleadings the motion should be denied.[71]

TRIAL OF ISSUES NOT RAISED BY THE PLEADINGS

Even when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.[72]

The statute providing that, when issues not raised by pleadings are tried by express or implied consent of parties they shall be treated as if raised in pleadings and amendment may be made in pleadings to conform to evidence, is sufficiently broad to authorize amendment to the petition by pen interlineation.[73]

Even though no amendment is made to conform the pleadings to the evidence, the judgment is nevertheless valid, for it is to be noted that Section 82 provides that "failure so to amend does not affect the result of the trial of these issues."[74]

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67. Hartvedt v. Harpst, 216 S.W. 2d 539 (Mo. App. 1949).
68. Feiden v. Gibson, *supra* note 49.
69. Empire Storage & Ice Co. v. Giboney, 210 S.W. 2d 55 (Mo. 1948).
70. Carter v. Decker, 199 S.W. 2d 48 (Mo. App. 1947).
71. Ralph D'Oench Co. v. St. Louis County Cleaning & Dyeing Co., 218 S.W. 2d 609 (Mo. 1949).
72. Rogers v. Poteet, 199 S.W. 2d 378 (Mo. 1947); Stark v. St. Louis Public Service Co., 211 S.W. 2d 500 (Mo. App. 1948); Allaben v. Shelbourne, 212 S.W. 2d 719 (Mo. 1948); Union National Bank v. Jessell, 215 S.W. 2d 474 (Mo. 1948); Snodgrass v. Potter, 215 S.W. 2d 497 (Mo. 1948); Abbott v. Seamon, 217 S.W. 2d 580 (Mo. App. 1949); Polich v. Hermann, 219 S.W. 2d 849 (Mo. App. 1949).
73. Standley v. City of Van Buren, 217 S.W. 2d 711 (Mo. App. 1949).
74. Polich v. Hermann, *supra* note 72.

INTERROGATORIES

Interrogatories can not be used in a proceeding in a magistrate court, since Section 2 of the General Code for Civil Procedure does not provide for application of the code to such proceedings.[75]

DISCOVERY UNDER SECTION 86

The party invoking this section should not be held to too strict a showing as to the contents of records which he has never seen, nor to too strict a requirement of materiality.

However, this law should not be used as a dragnet on a fishing expedition. A motion requesting "all" documents coming to a party within a particular time is too general. One has no right to inspect a document which is immaterial to a case.[76]

DOCKETING CASES

A judgment in a case which was brought to collect money damages and which was improperly placed on the "Jury Waived Docket" was set aside when material damage was shown to have been caused to the defendant by the error.[77]

CONTINUANCES

a. *By Appellate Court*

An appellate court may, under Section 92, continue proceedings in an appeal before it.[78]

b. *Counsel Member of General Assembly*

Section 96 provides that a continuance may be had by an attorney who is a member of and in attendance upon the General Assembly, and no trial is to be had until an adjournment or recess of the General Assembly for twenty days or more, nor for ten days thereafter. Judicial notice is taken of records of the General Assembly in connection with this law.[79]

When an application for a continuance is filed under Section 96, the trial court has the right to determine whether the legislator's presence is necessary to a fair and proper trial. In other words, the filing of such application in proper form does not instanter divest the trial court of jurisdiction and thus prohibit any further proceedings therein "until the adjournment or recess for twenty days or more of the general assembly [and] ten

75. State v. Sestric, 216 S.W. 2d 152 (Mo. App. 1948).
76. State v. Witthaus, 219 S.W. 2d 383 (Mo. 1949).
77. Wagner v. Shelly, 210 S.W. 2d 394 (Mo. App. 1948).
78. Anderson v. Kuhs, 213 S.W. 2d 238 (Mo. App. 1948).
79. State v. Massey, 219 S.W. 2d 326 (Mo. 1949).

days thereafter" regardless of the necessity of the legislator's presence to a fair trial and regardless of the fact that the legislator attorney is given a reasonable opportunity to be present and is actually present and participates in the further proceedings after the application is filed, and without mentioning his application for a continuance.

Of course, the litigants and lawyers who are members of the general assembly should be given every reasonable consideration and their rights carefully protected by the courts.[80]

c. *Application for Continuance*

Application for a continuance on account of the absence of witnesses or their evidence requires first, that the application for continuance must state facts showing the materiality of the evidence sought to be obtained from the witness, secondly, that the name and residence of such witness, if known, be stated and that the witness is not absent by the connivance, consent, or procurement of the applicant and that such application is not made for vexation or delay but in good faith.[81]

CONSOLIDATION OF SUITS

Courts in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, or of any separate issue or of any number of claims, cross-claims, or issues.[82]

RIGHT TO TRIAL BY JURY

Where a petition stated an equitable cause of action so that the defendant was not entitled to demand a jury trial, the failure of the defendant to make such a demand did not constitute a waiver of his right of jury trial on the legal issues involved.[83]

DISMISSALS

Where, from the facts appearing from the evidence in a case, the plaintiff shows no right to relief, the trial court is correct when it dismisses the action.[84] Filing a statement that a case is dismissed is not of itself a dismissal. A dismissal is a judgment, and requires an order of court.[85]

80. Todd v. Stokes, 215 S.W. 2d 464 (Mo. 1948).
81. Houston v. Ball, 214 S.W. 2d 723 (Mo. App. 1948).
82. Barr v. Snyder, 219 S.W. 2d 305 (Mo. 1949).
83. Krummenacher v. Western Auto Supply Co., 217 S.W. 2d 473 (Mo. 1949).
84. Cottonseed Delinting Corp. v. Roberts Brothers, Inc., 218 S.W. 2d 592 (Mo. 1949).
85. State *ex rel.* Grace v. Connor, 219 S.W. 2d 867 (Mo. App. 1949).

Although a trial court does not expressly rule on an appellant's motion to dismiss, yet it is to be assumed the motion is overruled, when the court resolves the issues and renders judgment on the merits for the respondent.[86]

Where a defendant files a motion to dismiss which is based upon lack of jurisdiction, improper venue, and failure to state a claim upon which relief can be granted, it was held that the dismissal was on the ground of failure to state a claim. This was so since the dismissal was expressly recited to be with prejudice, which operated as an adjudication on the merits. Had the court intended to sustain the motion upon the ground of lack of jurisdiction or improper venue, it would not have entered an order which purported to operate as an adjudication on the merits, since in a situation where both its jurisdiction and venue were attacked, an adjudication on the merits not only implied that the court had jurisdiction of the cause but also that the venue was proper. In fact the very code section which provides that a dismissal with prejudice shall operate as an adjudication on the merits at the same time denies such effect to an involuntary dismissal for lack of jurisdiction or improper venue.

It was enough to warrant the court's action in sustaining the motion that it should have found any one of the grounds to be well taken, and the fact that it specified no single ground raises no presumption that it sustained the motion on all three grounds.[87]

Where the defendant, at the end of the plaintiff's case, moved to strike all of the plaintiff's evidence from the record on the ground that the petition failed to show a cause of action, he did not move for a dismissal or for a directed verdict. Hence, he had no right under Section 100 to offer further evidence after a ruling on his motion.[88]

Where the dismissal in a case was the first and only voluntary dismissal of the action and the plaintiffs did dismiss their action "before the same was finally submitted to the jury," they were *entitled* to a dismissal "without prejudice." Under such circumstances neither the plaintiffs nor the court need to specify that such a voluntary dismissal so made is "without prejudice." It was required only that it be the first voluntary dismissal of the action and taken at the stage of the trial designated by Code Section 99. Such a dismissal is expressly eliminated in Code Section 101 from dismissals

86. Lucas Hunt Village Co. v. Klein, 218 S.W. 2d 595 (Mo. 1949).
87. Dee v. Stahl, 219 S.W. 2d 883 (Mo. App. 1949).
88. Munday v. Austin, 218 S.W. 2d 624 (Mo. 1949).

there defined which shall constitute dismissals *with prejudice* if not otherwise specified by the court.

A judgment entry in such a case which shows the facts suggested above enters a judgment of dismissal without prejudice.[89]

Where there was no showing of a final judgment in a separate maintenance action in Illinois, but only a temporary award of support money to a wife, the order making the award did not bar the husband's subsequent divorce action in Missouri.

Further, an order dismissing the husband's Illinois divorce action did not bar a subsequent divorce action in Missouri, where the record did not show that the Illinois action was dismissed on the wife's motion and both the Illinois and Missouri law permitted dismissal by a plaintiff without prejudice.[90]

Instructions

The function of instructions is to inform the jury of the law as it is applicable to the facts of the case. Abstract statements of law, even though correctly stating the principles involved, fail as instructions when they permit speculation as to their application.[91]

It is never safe, and seldom proper, for an instruction merely to follow the broad language of an appellate court *which is announcing only a general principle of law.* An instruction must be confined to the issues made by the pleadings and supported by the evidence in each case.[92]

Where parties stipulated that the only points to be raised by the plaintiff on the plaintiff's appeal were whether the court erred on refusing to give, as originally offered by plaintiff, certain instructions, and whether the court erred in giving one of the defendant's instructions, the supreme court was not required to consider the plaintiff's suggestion that instructions, as modified, imposed an undue burden on the plaintiff.[93]

An instruction that is broader than the pleadings and the evidence and which grants to the jury a roving commission to find for plaintiff on a different basis than that pleaded and shown by the evidence, or which gives no guidance to the jury, but permits them to find for plaintiff on any theory of negligence they can construct is erroneous.[94]

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89. Potter v. McLin, 214 S.W. 2d 751 (Mo. App. 1948).
90. Elliston v. Elliston, 215 S.W. 2d 63 (Mo. App. 1948).
91. Landman v. John Hancock Mut. Life Ins. Co., 211 S.W. 2d 530 (Mo. App. 1948).
92. Winter v. Haan, 211 S.W. 2d 544 (Mo. App. 1948).
93. Benham v. McCoy, 213 S.W. 2d 914 (Mo. 1948).
94. *Ibid.*

An instruction which purports to cover the whole case and fails to require the jury to find a causal connection between the injury suffered and the negligence charged is erroneous.[95]

An instruction undertaking to cover the whole case and authorizing recovery upon hypothetical facts must limit the hypothetical facts stated therein to such as are within the allegations of the petition and are, also, within the facts proven.[96] A requested instruction must be correct or the court may refuse it without committing reversible error; and when erroneous instructions are requested the trial court is under no duty to correct or modify them in any way.[97] If a defendant considers an instruction misleading she should object to it on that ground at the trial and where she does not then object to it, objection on that ground is not properly before the appellate court for review.[98]

Function of Jury

It is the function of a jury to decide fact issues and it should not be asked to pass upon questions of law.[99]

The supreme court on an appeal will not invade the province of the jury by determining the credibility of witnesses and the weight and value of their testimony.[100]

Form and Construction of Verdict

The general rule is that the verdict must be clear and unambiguous so that a judgment may be written upon it without resorting to inference or to construction. It is also the rule that if from a consideration of the whole record the meaning of the jury can be made clear and the judgment is based upon what the jury actually found, the judgment will be upheld. Verdicts should be construed to give them effect if it can reasonably be done.[101]

Motion for Directed Verdict

Code Section 112 provides for "a motion for a directed verdict" to replace our former demurrer to the evidence.[102]

Where no motion for a directed verdict grounded on insufficiency of evidence was filed at the close of the whole case, and no assignment on that

95. *Ibid.*
96. *Ibid.*
97. Hertz v. McDowell, 214 S.W. 2d 546 (Mo. 1948).
98. Goggin v. Schoening, 199 S.W. 2d 87 (Mo. App. 1947).
99. Benham v. McCoy, 213 S.W. 2d 914 (Mo. 1948).
100. Mullis v. Thompson, 213 S.W. 2d 941 (Mo. 1948).
101. McIlvain v. Kavorinos, 212 S.W. 2d 85 (Mo. App. 1948).
102. Johnson v. Kansas City Public Service Co., 214 S.W. 2d 5 (Mo. 1948).

ground was incorporated in a motion for a new trial, the defendants were precluded from maintaining that the evidence did not sustain the charge of the petition.[103]

CASES TRIED WITHOUT A JURY

a. *Findings of Fact*

Where a party fails to request a finding on an issue involved in a case tried by a court, he can not on appeal complain of the court's failure to make a finding on that issue.[104]

b. *Duties of Appellate Court*

Where a trial is to the court, the review is de novo on the whole record as in suits of an equitable nature and it is the duty of the appellate court to weigh conflicting evidence.[105]

In such a case, however, due deference is given to the findings of fact of the trial court because of that court's better opportunity to judge of the credibility of the witnesses,[106] and the judgment of the trial court should not be set aside unless it is clearly erroneous.[107] On the other hand, the findings by a court trying a case without a jury lose their weight when competent evidence is excluded.[108] In such a case, the appellate court

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103. Rogers v. Poteet, 199 S.W. 2d 378 (Mo. 1947); Hauber v. Gentry, 215 S.W. 2d 754 (Mo. 1948).

104. Messina v. Greubel, 215 S.W. 2d 456 (Mo. 1948).

105. Schell v. City of Jefferson, 212 S.W. 2d 430 (Mo. 1948); Dolan v. Truck Equipment Co., 212 S.W. 2d 438 (Mo. 1948); State *ex rel.* Taday v. Sloan's Moving & Storage Co., 212 S.W. 2d 566 (Mo. 1948); House v. Santa Fe Trail Transp. Co., 217 S.W. 2d 382 (Mo. 1949); Cottonseed Delinting Corp. v. Roberts Brothers, Inc., 218 S.W. 2d 592 (Mo. 1949); Gershon v. Ashkanazie, 199 S.W. 2d 38 (Mo. App. 1947); Folger v. Lowery, 210 S.W. 2d 1011 (Mo. App. 1948); Avellone v. John Weisert Tobacco Co., 213 S.W. 2d 222 (Mo. App. 1948); Bussinger v. Ginnever, 213 S.W. 2d 230 (Mo. App. 1948); Fitzgerald v. Schaefer, 216 S.W. 2d 939 (Mo. App. 1949); Eldridge v. Logan (State Department of Public Health and Welfare, Third Party Defendant), 217 S.W. 2d 588 (Mo. App. 1949); Boeving v. Vandover, 218 S.W. 2d 175 (Mo. App. 1949).

106. McFaw Land Co. v. Kansas City Title & Trust Co., 211 S.W. 2d 44 (Mo. 1948); Costello v. Moore, 211 S.W. 2d 921 (Mo. 1948); Dolan v. Truck Equipment Co., *supra* note 105; Powell v. Huffman, 213 S.W. 2d 473 (Mo. 1948); Herzog v. Ross, 213 S.W. 2d 921 (Mo. 1948); Folger v. Lowery, *supra* note 105; Avellone v. John Weisert Tobacco Co., *supra* note 105; Bussinger v. Ginnever, *supra* note 105; Fitzgerald v. Schaefer, *supra* note 105; Middleton v. American States Ins. Co., 217 S.W. 2d 386 (Mo. App. 1949); Eldridge v. Logan (State Department of Public Health and Welfare, Third Party Defendant) *supra* note 105; Boeving v. Vandover, *supra* note 105.

107. Costello v. Moore, *supra* note 106; Dolan v. Truck Equipment Co., *supra* note 105; Gershon v. Ashkanazie, *supra* note 105; Folger v. Lowery, *supra* note 105; Avellone v. John Weisert Tobacco Co., *supra* note 105. Compare Durham v. Bill Sullivan Chevrolet Co., 213 S.W. 2d 968 (Mo. 1948).

108. Williams v. Patterson, 218 S.W. 2d 156 (Mo. App. 1949).

should consider competent excluded evidence which is preserved for appeal.[109]

Section 114 of the General Code for Civil Procedure has been applied in the case of a conviction of the violation of a city ordinance.[110] It has also been held that this section prevails over Section 1159 of the Revised Statutes of Missouri, 1939, which provides that, if the report of a referee is confirmed by the court, judgment shall be rendered thereon in the same manner and with like effect as upon a special verdict.[111]

Motion for New Trial

a. *Purposes of Motion for New Trial and of Section 115 and of Supreme Court Rule 3.22*

The functions of a motion for a new trial are to obtain relief in the trial court and on appeal.[112] The purpose of the section and rule referred to above is to clothe the trial judge, who enjoys the advantage of meeting the parties and witness face to face, with a wide discretion to be exercised in furtherance of substantial justice.[113] But the court should not act arbitrarily.[114] In determining whether the trial court acted in exercise of judicial discretion in granting a new trial on the ground that the verdict was against the weight of the evidence, the supreme court will endeavor to ascertain whether there was sufficient substantial evidence to sustain the verdict.[115]

b. *Grounds for*

The trial court may now grant a new trial "for any of the reasons for which new trials have heretofore been granted."[116] Recent cases have held, specifically, that a new trial may be granted on the grounds of false testimony,[117] improper argument,[118] and because the verdict was against the

109. Cottonseed Delinting Corp. v. Roberts Brothers, Inc., *supra* note 105; Williams v. Patterson, *supra* note 108.
110. City of Springfield v. Stevens, 216 S.W. 2d 450 (Mo. 1949).
111. Baerveldt & Honig Const. Co. v. Dye Candy Co., 212 S.W. 2d 65 (Mo. 1948). Compare Crawford v. A. J. Sheahan Granite Co., 211 S.W. 2d 52 (Mo. App. 1948).
112. Donati v. Gualdoni, 216 S.W. 2d 519 (Mo. 1949).
113. Donati v. Gualdoni, *supra* note 112; Bulkley v. Thompson, 211 S.W. 2d 83 (Mo. App. 1948).
114. Donati v. Gualdoni, *supra* note 112; Happy v. Walz, 213 S.W. 2d 410 (Mo. 1948).
115. Happy v. Walz, *supra* note 114.
116. Donati v. Gualdoni, *supra* note 112.
117. *Ibid.*
118. Bulkley v. Thompson, *supra* note 113.

weight of the evidence.[119] In reviewing the action of a trial court in sustaining a motion for a new trial, the appellate court will give the specified grounds for the motion a broad and liberal construction.[120]

c. *Form of*

Supreme Court Rule 3.23 relates to the sufficiency of motions for new trials in connection with appeals and has nothing to do with a trial court's right to pass upon its own errors.[121]

d. *Time Within Which to Make Motion*

Motions for new trials must be filed within ten (10) days after entry of judgment.[122] But it should not be filed prematurely before final disposition of all of the issues in the cause to which the motion could be addressed.[123]

e. *When Judgment Entered*

In jury trials, in connection with the time within which new trials may be requested, the judgment shall be entered as of the day of the verdict.[124]

f. *Finality of Judgment*

By the timely filing of a motion for a new trial, the finality of the judgment involved is suspended.[125]

g. *Proof of Grounds of New Trial*

Affidavits are not necessary to prove the grounds of a new trial, if the court can determine the facts essential to the proof of said grounds from the evidence presented at the trial.[126]

h. *When Motion for New Trial Deemed Denied*

A motion for a new trial is deemed denied if not passed on within ninety (90) days after it is filed.[127]

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119. Westinghouse Electric Supply Co. v. Binger, 212 S.W. 2d 445 (Mo. App. 1948).
120. Donati v. Gualdoni, *supra* note 112.
121. White v. Metropolitan Life Ins. Co., 218 S.W. 2d 795 (Mo. App. 1949).
122. Johnson v. Kansas City Public Service Co., 214 S.W. 2d 5 (Mo. 1948).
123. Stone v. Boston, 218 S.W. 2d 783 (Mo. App. 1949).
124. Donati v. Gualdoni, *supra* note 112.
125. Bank of Thayer v. Kuebler, 219 S.W. 2d 297 (Mo. App. 1949).
126. Donati v. Gualdoni, *supra* note 112.
127. Gockel v. Jenkins, 210 S.W. 2d 691 (Mo. App. 1948); Beahan v. St. Louis Public Service Co., 213 S.W. 2d 253 (Mo. App. 1948); Tuttle v. Brayton, 215 S.W. 2d 46 (Mo. App. 1948). Rosbrugh v. Motley, 216 S.W. 2d 165 (Mo. App. 1948).

Control of Court Over Judgment

A trial court may, within thirty (30) days after entry of its original judgment, set that judgment aside, regardless of whether or not a motion for a new trial has been filed.[128] On the other hand, when that thirty (30) day period has elapsed, the court can not, after passing on a motion for a new trial, exercise further control over its judgment.[129]

Effect of Section 120

The effect of Code Section 120 was to abolish motions in arrest of judgment and to substitute therefor a nameless motion by which relief theretofore granted by motion in arrest could be secured. Where a verdict against a surety on a bond was greater than that against his principal, under that section, a motion to correct the verdict and judgment by reducing the same to the amount found against the principal was correct.[130]

Exceptions to Rulings of a Court

Under Section 122 of the General Code for Civil Procedure, objections to rulings of a court must be made at the time of those rulings, if they are to be considered in later proceedings.[131] However, exceptions need not be taken to rulings.[132] Section 122, as amended by 1 Laws of Missouri, 1947, page 227, no longer requires that specific objections to instructions be made at a trial.[133] It has been held, it seems erroneously, that it is, even now, insufficient to object to an instruction at a trial by saying, "We object to the instruction."[134]

Section 122 further provides that, if a party has no opportunity to object to an action of a court at the time thereof, the absence of an objection thereto does not thereafter prejudice the party. This was recently illustrated

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128. Jones v. Williams, *supra* note 56.

129. Rosbrugh v. Motley, *supra* note 127; Bank of Thayer v. Kuebler, *supra* note 125.

130. State v. Earley, 219 S.W. 2d 879 (Mo. App. 1949).

131. Holdman v. Thompson, 216 S.W. 2d 72 (Mo. 1948); Bulkley v. Thompson, *supra* note 113; Rosebrough v. Montgomery Ward & Co., 215 S.W. 2d 295 (Mo. App. 1948); Booten v. Sutter, 216 S.W. 2d 129 (Mo. App. 1949); Martin v. Martinous, 219 S.W. 2d 667 (Mo. App. 1949). The Holdman and Booten cases are in accord with this, even in connection with instructions.

132. Holdman v. Thompson, *supra* note 131; Welty v. Niswonger's Estate, 217 S.W. 2d 736 (Mo. App. 1949).

133. Holdman v. Thompson, *supra* note 131; Cruce v. Gulf, Mobile & Ohio R.R., 216 S.W. 2d 78 (Mo. 1948); Welty v. Niswonger's Estate, *supra* note 132; White v. Metropolitan Life Ins. Co., *supra* note 121.

134. Bulkley v. Thompson, *supra* note 113.

by a case in which the court improperly, and without knowledge of the parties, discussed a case in chambers with the foreman of the jury.[135]

Writs of Error Abolished

Section 125 of the General Code for Civil Procedure abolishing writs of error was constitutional and their use has not been authorized by the 1945 Constitution or by later statutes.[136]

Appeal

a. *Grounds for Appeal*

1. Aggrieved Party

Defendants were not "aggrieved parties" and could not appeal from an order granting them a new trial upon their alternative motion for a new trial or for judgment non obstante veredicto.[137]

An administrator of the estate of a deceased person has no right of appeal from a judgment unless the record shows that he is an aggrieved party in his capacity as administrator.[138]

2. Judgments and Orders Appealable

An appeal may be taken from a final judgment.[139]

A judgment, to be final, must dispose of all the parties and of all the issues in the case.[140]

The mere ruling, decision, or opinion of the court, no judgment or final order being entered in accordance therewith, does not have the effect of a judgment, and is not reviewable by appeal.[141]

Where the right to intervene is by statute made absolute, or where the claim can be established, preserved, or enforced in no other way than by intervention, an order refusing intervention may be reviewed by appeal.[142]

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135. Hartgrove v. Chicago, B & Q. R.R., 218 S.W. 2d 557 (Mo. 1949).
136. State v. Hughes, 199 S.W. 2d 405 (Mo. 1947).
137. Vendt v. Duenke, 210 S.W. 2d 692 (Mo. App. 1948).
138. Clark v. Beasley, 213 S.W. 2d 645 (Mo. App. 1948).
139. Jones v. Williams, *supra* note 56; Johnson v. Kansas City Public Service Co., *supra* note 102.
140. Hanover Fire Ins. Co. v. Commercial Standard Ins. Co., 215 S.W. 2d 444 (Mo. 1948); Thompson v. Dye, 211 S.W. 2d 939 (Mo. App. 1948); Stone v. Boston, *supra* note 123.
141. Stone v. Boston, *supra* note 123.
142. City of St. Louis v. Silk, 199 S. W. 2d 23 (Mo. App. 1947).

If a court's order amending a petition relates to parties and has the force and effect of finally disposing of the cause, or of its merits in some material respect, as to one or more of the parties, the order is appealable.[143]

An order of a trial court sustaining a motion to dismiss on the ground that no cause of action is stated is a final adjudication upon the merits.[144]

Generally an order dismissing a supplemental petition is a final, appealable judgment. Certainly this is so when the effect of the order is to completely and finally dispose of the case on its merits in some material respect. An appeal from an order denying leave to file a supplemental petition is fairly comparable to the dismissal of an intervening petition. In these instances the rulings have the force of an order sustaining a demurrer to a petition.[145]

Also, when a court renders judgment on a motion to modify an interlocutory judgment, the judgment becomes final.[146]

Further, a court order either approving or disapproving exceptions to the final report of trustees under a mortgage deed of trust is an appealable final judgment.[147]

On the other hand, an order sustaining the defendant's motion to quash a service was not a final judgment.[148]

Where intervention is not indispensable to the preservation or enforcement of a right claimed by the petitioner, the petition to intervene is purely discretionary and an order refusing it is not a final judgment.[149]

Further, if an order adding or denying the addition of parties does not have the effect of discharging some of the parties or of creating or enlarging liability, the order is not appealable.[150]

Where suit on one cause of action was brought against two defendants and the motion of one defendant to dismiss was granted, the original cause was pending and undisposed of as to the other defendant who had filed an answer, so the appeal by the plaintiff from the order granting the motion was premature and would be dismissed for lack of a final appealable

143. Bruun v. Katz Drug Co., 211 S.W. 2d 918 (Mo. 1948).
144. Jones v. Williams, *supra* note 56; Husser v. Markham, 210 S.W. 2d 405 (Mo. App. 1948).
145. Koplar v. Rosset, 214 S.W. 2d 417 (Mo. 1948).
146. Abbott v. Seamon, 217 S.W. 2d 580 (Mo. App. 1949).
147. Koplar v. Rosset, *supra* note 145.
148. Tobin Asphalt Products, Inc. v. Henwood, 199 S.W. 2d 415 (Mo. App. 1947).
149. City of St. Louis v. Silk, *supra* note 142.
150. Bruun v. Katz Drug Co., *supra* note 143.

judgment.[151] The same result has been reached where the defendant's motion for a new trial was sustained as to one defendant and was dismissed as to the other. The latter's appeal was held to be premature.[152]

In an action to enjoin trespasses, an order simply continuing a temporary injunction for 30 days to permit the defendants to establish their title to disputed premises and providing that, if the defendants failed to comply therewith, the injunction should be made permanent was not an appealable final order.[153]

Where judgment for the removal of trustees under a mortgage deed was affirmed, and a final report asking discharge was filed, to which the plaintiffs filed timely exceptions charging misconduct since the rendition of the judgment and set forth the substance of a proposed supplemental petition seeking recovery for such acts of misconduct, an order denying leave to file the petition was not a final appealable order since it was made during pendency of the exceptions, notwithstanding the order recited it was a final decree by agreement of the parties.[154]

Finally, it has recently been held that where a party seeking to appeal from an interlocutory decree in partition ordering the sale of realty admitted that he was not claiming a greater or lesser interest in property than was awarded him by decree, no right of appeal existed.[155]

But an interlocutory order dismissing parties from a case may be properly considered on an appeal from a final judgment in that case.[156]

b. *How Taken*

1. Notice of Appeal

No appeal is effective without a notice of appeal, filed either within ten days after the judgment becomes final or within six months after the judgment has become final, under special order of the appellate court on application. Without timely notice of appeal under one or the other of such sections the appellate court acquires no jurisdiction.[157]

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151. Hanover Fire Ins. Co. v. Commercial Standard Ins. Co., *supra* note 140.
152. Thompson v. Dye, *supra* note 140.
153. Stone v. Boston, *supra* note 123.
154. Koplar v. Rosset, *supra* note 145.
155. Brouk v. Nahlik, 216 S.W. 2d 550 (Mo App. 1948).
156. S. S. Kresge Co. v. Shankman, 212 S.W. 2d 794 (Mo. App. 1948).
157. Goekel v. Jenkins, *supra* note 127; Johnson v. Kansas City Public Service Co., *supra* note 122; Bank of Thayer v. Kuebler, *supra* note 125.

Defendants filed the following instrument as a notice of appeal:

"Circuit Court for the County of Clay State of Missouri

Mrs. John A. Krall, Robert S. Withers, Mrs. A. E. Perkins, Mrs. Cecil C. Way and Mrs. F. R. Hulse — Plaintiff..

v.

Charles C. Light and Helene C. Light — No. 17702 — Defendant..

Notice of Appeal

Notice is hereby given that Charles C. Light and Helen C. Light defendants above-named, hereby appeal—to the Kansas City Court of Appeals from the final judgment entered in this action on the 16th day of October, 1946, defendants' amended motion for a new trial having been filed on the 22nd day of October, 1946 and overruled November 10, 1946.

Ward Dorsey
George Aylward
Attorney for defendants
Address 1215 Commerce Building, Kansas City, Missouri."

Dated November 19, 1946

It was held that as it indicated an attempt, in good faith, to appeal from a final judgment rendered in this case, and did not appear to mislead the plaintiffs to their irreparable harm, by reason of its irregularity, it would be deemed sufficient.[158]

Under code provisions and court rules fixing the time within which a notice of appeal must be filed the limitation is the allowable maximum time therefor and there is no restriction on filing the notice within the maximum period.[159]

The general provision as to the time within which an appeal must be taken applies to divorce cases.[160]

Where a judgment was rendered assessing damages as against the plaintiff and her surety as obligors in an injunction bond, and the plaintiff and her surety gave separate notices of appeal, there was still a single case in

158. Krall v. Light, 210 S.W. 2d 739 (Mo. App. 1948).
159. Johnson v. Kansas City Public Service Co., *supra* note 122.
160. State *ex rel.* Fawkes v. Bland, *supra* note 42.

the Court of Appeals on appeal, though each notice of appeal when received by clerk of Court of Appeals was filed under a separate docket number.[161]

2. Transcript of the Record

(a) Time within which to File

Where the appellant's attorney was advised by the court reporter that he would not be able to get appellant's transcript out in 90 days from September 17th, the date when notice of appeal was filed, and the attorney, who inadvertently made a notation of October 27th as the date of appeal, moved in open court on January 11th for an extension of time, without objection by respondents' attorneys, and the court granted an extension of 90 days, and the transcript was filed March 12th, the extension order was valid because of excusable neglect, precluding dismissal of an appeal.[162]

The supreme court has also held that where failure to file a transcript in time was due to the necessity of paying for it in installments out of a $35 weekly salary which was also required to provide for four children and to satisfy the landlord, the supreme court had power to extend the time for filing and reasonably exercised it.[163]

(b) Correction of Transcript

Absent consent of the parties, a motion to correct a transcript of the record which is not made until after service of the respondent's brief is, by the terms of Supreme Court Rule 1.03, too late.[164]

(c) Transcript Binding on Appellate Court, When

The appellate court is bound by the transcript when it is approved by both sides.[165]

3. Briefs

(a) Content

Section 139(a) of the Civil Code of Missouri provides that all briefs shall be prepared as provided by rule of the appellate court.[166]

Rule 1.08 adopted by the supreme court and applicable to appellate practice and procedure provides that the brief for appellant shall contain

161. Waterman v. Waterman, 210 S.W. 2d 723 (Mo. App. 1948).
162. Baldwin v. Desgranges, 199 S.W. 2d 353 (Mo. 1947).
163. Leaman v. Campbell 66 Express Truck Lines, Inc., 199 S.W. 2d 359 (Mo. 1947). For a case in which the illness of the court reporter has held to justify a delay in filing the transcript, see Bock v. Eilen, 211 S.W. 2d 92 (Mo. App. 1948).
164. Donati v. Gualdoni, *supra* note 112.
165. Schubert v. St. Louis Public Service Co., 214 S.W. 2d 420 (Mo. 1948); Prague v. Eddy, 214 S.W. 2d 521 (Mo. 1948).
166. Feltenberger v. Evers, 210 S.W. 2d 404 (Mo. App. 1948); McHenry v. Wabash R.R., 216 S.W. 2d 538 (Mo. App. 1948).

(1) a concise statement of the grounds upon which the jurisdiction of the review court is invoked; (2) a fair and concise statement of the facts without argument; (3) the points relied on, which shall specify the allegations of error. "(b) The fair and concise statement of the facts shall be in the form of a statement of the facts relevant to the questions presented for determination. . . . (c) The statement of the facts and the arguments shall have specific page references to the transcript on appeal."[167]

Where the appellants' statement on appeal from judgment for the city plaintiff in suit to enjoin the violation of a zoning ordinance was not preceded by a jurisdictional statement, as required by the supreme court's rules, but certain pages of the statement of facts set forth that the ordinance was unconstitutional in three respects and the whole of the appellants' brief and the argument therein were devoted to the constitutionality of the ordinance, and the amended answer of the appellants pleaded that the ordinance was unconstitutional in certain specified respects, and the cause was transferred to the supreme court by the court of appeals on the specified ground that the controversy involved constitutional questions, the supreme court had jurisdiction of the appeal.[168]

Where the statement of the facts in the appellant's brief, while not a model, is sufficient to inform the court of the facts in the case and of the issues presented by the appeal, it is adequate.[169]

Where the appellants' brief was deficient in certain respects, but the respondent in his brief presented a complete statement of all the evidence together with reference to pleadings, with numerous citations to pages of transcript where information might be found, the appeal would be considered, but the court warned that its consideration of the appeal was not to be construed as a waiver by the court of substantial compliance with the court rules applicable to appellate procedure.[170]

(b) Dismissal for Lack of Insufficiency of Brief

The penalty for a substantial violation of the supreme court's rule requiring certain matters to be contained in briefs is either dismissal of the appeal or affirmance of the judgment.[171]

167. McHenry v. Wabash R.R., *supra* note 166. In accord as to the necessity of stating points and authorities, see Folger v. Lowery, *supra* note 105, and Royal v. Thompson, 212 S.W. 2d 921 (Mo. 1948).

168. City of Richmond Heights v. Richmond Heights Memorial Post Benevolent Ass'n, 213 S.W. 2d 479 (Mo. 1948).

169. Cruce v. Gulf, Mobile & Ohio R.R., *supra* note 133.

170. Marquis v. Pettyjohn, 212 S.W. 2d 100 (Mo. App. 1948).

171. Royal v. Thompson, *supra* note 167; Feltenberger v. Evers, *supra* note 166; McHenry v. Wabash R.R., *supra* note 166.

The language of Rule 1.15 of the supreme court, authorizing the appellate court to dismiss an appeal "when the cause is called for hearing," has no application to a situation where an appellant has not only failed to comply with the rules and is, without good cause, knowingly in default before the date of the hearing, but has also disregarded the order and admonition of the court with respect to a continuance of the cause to a fixed date made by the court in accordance with Section 92 of the General Code for Civil Procedure. The language of the rule does not mean that the court is compelled to wait until the cause is called for hearing before it can exercise the power of dismissal. It merely means that when a cause is set on the docket in the usual way for hearing on a particular date and no action is taken by the court thereon up to the time the cause is called for such hearing, then, if an appellant has failed to comply with the rules mentioned, the court will dismiss the appeal "unless good cause is shown or the interests of justice otherwise require."[172]

(c) Time for Filing

Where appellant's counsel had been ill and confined to his home under the care of a physician, and had been unable to prepare his appeal brief and file it within time required by supreme court rule, the requirement as to time within which a brief must be filed would be suspended under the rule authorizing suspension or modification of rules upon a showing that justice so requires.[173]

(d) By Whom Filed

Where the trial court sustained a motion for a new trial without specifying of record the reasons therefor, under supreme court rule 1.10, the presumption was that the motion was erroneously granted and it became the duty of the respondent, after the appellant had served a proper statement on time, to file the first brief in the appellate court and to uphold the action of the trial court in sustaining the motion.[174]

c. *Matters Considered on Appeal*

1. In General

The scope of review in an action at law tried on facts with a jury is generally governed by the provisions of the Civil Code prohibiting consideration of allegations of error not presented to or decided by the trial court and prohibiting a review except for material error against the appel-

172. Anderson v. Kuhs, 213 S.W. 2d 238 (Mo. App. 1948).
173. Frank v. Atlanta Life Ins. Co., 211 S.W. 2d 940 (Mo. App. 1948).
174. Ragsdale v. Young, 215 S.W. 2d 514 (Mo. App. 1948).

lant and by the supreme court rule relating to the contents of briefs. However, effect must be given to the supreme court rule relating to the consideration of plain errors.[175]

2. Insufficiency of Pleading

Substantial insufficiency of pleadings may be considered though made initially on appeal.[176]

But this is not true of defects in pleadings which do not result in a total failure thereof to state a claim or defense.[177]

3. Sufficiency of Evidence

Although an appeal normally does not lie from an order overruling a motion for judgment for the defendant, and although the trial court acted within its discretion in granting the defendant a new trial, the questions raised by the defendant as to whether the plaintiff made out a cause were basic, and the supreme court would examine evidence to determine whether the plaintiff made out a case for the jury so that the parties would be saved the expense of another trial if it appeared that the plaintiff could not recover.[178]

Where the appellants filed no motion for a new trial, but the trial court considered the sufficiency of the appellants' evidence on the respondent's motion after trial for judgment as on a directed verdict as well as upon the respondent's motions for a directed verdict at the close of the plaintiff's evidence and again at the close of all of the evidence, the supreme court could consider the sufficiency of the evidence to make a submissible case for the appellants.[179]

4. Errors not Assigned—Plain Error

Usually points not urged on appeal either by assignment of error or by points and authorities are deemed abandoned and will not be considered.[180] However an appellate court may, by Supreme Court Rule 3.27, consider plain errors affecting substantial rights, though they are not raised in

175. Urie v. Thompson, 210 S.W. 2d 98 (Mo. 1948); Hauber v. Gentry, 215 S.W. 2d 754 (Mo. 1948); Wright v. Ickenroth, 215 S.W. 2d 43 (Mo. App. 1948).
176. Rogers v. Poteet, *supra* note 54; Holtz v. Daniel Hamm Drayage Co., 209 S.W. 2d 883 (Mo. 1948); Powell v. Huffman, *supra* note 106.
177. Ebeling v. Fred J. Swaine Mfg. Co., 209 S.W. 2d 892 (Mo. 1948).
178. Bailey v. Interstate Airmotive, 219 S.W. 2d 333 (Mo. 1949).
179. Johnson v. Kansas City Public Service Co., *supra* note 102.
180. Folger v. Lowery, *supra* note 105.

the trial court or preserved for review or are defectively raised or preserved.[181]

d. *Judgment on Appeal*

1. In General

Section 140 of the General Code for Civil Procedure provides that an appellate court may award a new trial or a partial new trial, reverse or affirm a judgment or order the trial court to give such judgment as such court ought to have given as it shall decide, and that "unless justice requires otherwise the court shall dispose finally of the case on appeal and no new trial shall be ordered as to issues in which no error appears."[182]

2. Favorable Error

Where an error is in the appellant's favor, under Section 123 and 140(b) of the Code of Civil Procedure 1943, an appellate court is precluded from reversing a judgment. If the respondents do not appeal from the judgment, they are not entitled to any affirmative relief, for the error committed against them, by a modification in any manner of the judgment in their favor.[183]

3. Error not Prejudicial

Section 140(b) of the General Code for Civil Procedure commands that no appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant materially affecting the merits of the action.[184]

Hence, where the judgment of the trial court produced a correct result, the supreme court would affirm it notwithstanding the reasons assigned therefor were erroneous.[185]

In an action for injuries sustained at the plaintiff's place of employment, where the plaintiff's fellow employees and bosses were equally available to both parties as witnesses and the plaintiff called as witness one fellow employee, who had personal knowledge of the occurrence and testified concerning the plaintiff's ability to work since his injury, his failure to call other employees as witnesses on the question whether he was injured or able to work did not necessarily permit the unfavorable inference argued to jury

181. Leaman v. Campbell 66 Express Truck Lines, *supra* note 163; Kindred v. Anderson, 209 S.W. 2d 912 (Mo. 1948); Rosebrough v. Montgomery Ward & Co., *supra* note 131; Welty v. Niswonger's Estate, *supra* note 132; Martin v. Martinous, *supra* note 131.
182. Barnes v. Chism, 215 S.W. 2d 775 (Mo. App. 1948).
183. Lynn v. Stricker, 213 S.W. 2d 672 (Mo. App. 1948).
184. Booten v. Sutter, *supra* note 131.
185. Kraemer v. Shelley, 214 S.W. 2d 525 (Mo. 1948).

by defendant's counsel. The plaintiff was not prejudicially injured by the argument.[186]

In an action for injuries to a pedestrian struck by the defendant's automobile, where the plaintiff's instructions hypothesized a finding of the defendant's reckless, wanton, and wilful misconduct, the defendant's given instructions that, to find him guilty of wilful or intentional wrongdoing, the jury must find that he consciously intended to injure the plaintiff or was guilty of wanton or reckless conduct, and that the burden was on the plaintiff to prove the defendant guilty of such conduct, were not prejudicially erroneous.[187]

Where the defendant's counsel read from a book to his expert witness on redirect examination, after the plaintiff's counsel had brought that book into the case and cross-examined the witness on it, the text used by the defendant in the original direct examination having been another text, the U. S. Bureau of Standards table, it being clear that both parties treated the first text as authoritative, and the questions asked by the defendant's counsel on redirect examination being pertinent in view of the cross-examination, the mere fact that they were asked on redirect examination did not constitute error, or at least not reversible error.[188]

There was no prejudicial error when the court failed in its judgment in the plaintiff's favor to rule on the defendant's motion to dismiss on the ground that the plaintiff's petition and evidence failed to make a case against the defendant, where the record clearly indicates that the defendant intended to rest his case on the plaintiff's evidence without regard to the court's ruling on the motion submitted.[189]

In a property owners' action against a city for damages resulting from blasting during the construction of a sewer, a charge permitting the assessment of damages if the jury found that the city created any condition which caused the plaintiff's property to be damaged by the construction of a sewer and blast was not so prejudicial as to require a new trial on the ground that the jury was misled or allowed recovery for some cause not pleaded or proved.[190]

An instruction, though erroneously drawn by the use of the word "expenditures," of which there was no evidence, rather than by the use of

186. Holtz v. Daniel Hamm Drayage Co., *supra* note 176.
187. Nichols v. Bresnahan, 212 S.W. 2d 570 (Mo. 1948).
188. Hemminghaus v. Ferguson, 215 S.W. 2d 481 (Mo. 1948).
189. Lucas Hunt Village Co. v. Klein, 212 S.W. 2d 480 (Mo. App. 1948).
190. Cook v. Kansas City, 214 S.W. 2d 430 (Mo. 1948).

the word "indebtedness," was not prejudicial, since the evidence showed that the reference was to indebtedness.[191]

4. Final Disposition of Case

Where all interested parties were heard in an action for the construction of a trust indenture and all material evidence was in the record before the supreme court, that court, upon determining that the indenture was void in law, made final disposition of the case on the appeal, though the trial court had granted a new trial after rendition of a decree holding the indenture valid, since nothing remained in the case to retry.[192]

5. Judgment Which Trial Court Should Have Given

Where the trial court erroneously rendered a judgment for the defendant, but all of the material facts had been presented and the law in relation to them ruled upon, there was no reason for a new trial; and the appellate court gave such judgment for the plaintiff as the trial court ought to have given, and remanded the cause with directions.[193]

Where the result reached by the appellate court has the same effect as that of the trial court, but for different reasons, it is the duty of the appellate court to give the judgment which the trial court should have given, as to the appellate court seems agreeable to law.[194]

6. Judgment Permitting a Remittitur

Where the trial court awarded a new trial on the ground of excessiveness of the verdict unless the plaintiff remitted $2,000, which the plaintiff refused to do, and it appeared that the case had been fully developed and there was substantial evidence in support of the trial court's holding, the order granting a new trial was affirmed, but the plaintiff was afforded an opportunity to remit $2,000 within a reasonable time.[195]

7. Omission of Implied Words

The words "for further proceedings in accordance with this opinion" found in the judgment of an appellate court add nothing to the appellate mandate which would not have been necessarily implied had they been omitted, and every case which is remanded is remanded for further pro-

191. Wright v. Ickenroth, *supra* note 175.
192. Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W. 2d 2 (Mo. 1948).
193. Spaeth v. Washington University, 213 S.W. 2d 276 (Mo. App. 1948).
194. Brinkop v. Brinkop, 215 S.W. 2d 70 (Mo. App. 1948).
195. Barnes v. Chism, *supra* note 182.

ceedings which are expected to be "in accordance with" the opinion rendered.[196]

Transfer from Court of Appeals

In 1948 the supreme court explained the new rule relating to transfer. In *Fizette v. Phillips*[197] the court said:

"Preliminary to a consideration of the merits, it may be noted that the case has been erroneously styled in this court as 'State ex rel. Mutual Casualty Company, relator, v. Bland, et al., Judges of the Kansas City Court of Appeals, respondents,' under which erroneous caption appellant filed its 'Application for order to transfer.' An application made to this court to transfer a cause from a court of appeals is but a further step in the same cause, in consequence of which no change is worked in the title. At the conference at which the application to transfer was passed on, the judge to whom the matter had been assigned entered the following on the back of the folder containing the files in the case, 'Transfer ordered, returnable 30 days to banc.' It appears, however, that the order entered was not in conformity with this minute, and that a writ of certiorari was, in fact, issued, although it had not been prayed, thus further complicating the record. The case will be docketed and reported under caption and style it bore in the Court of Appeals, and in the trial court, as hereinabove shown, and it is so ordered.

"In this connection we take occasion to say that there has been some lack of understanding as to the purpose and effect of rule 2.06 relating to transfers from the Courts of Appeals, which was adopted subsequent to the effective date of the Constitution of 1945. When present rule 2.06 was adopted (July 1945) former rules 2.06 (in relation to certiorari for conflict of decision) and 2.061 (in relation to transfers on the ground of general interest or importance of the question involved, or re-examination of the existing law) were repealed, and the two sections were merged (with certain changes) and promulgated as rule 2.06. It was thereby intended to provide one uniform method of procedure for the review by this court of cases decided by the Courts of Appeals, namely by transfer, whether the ground be conflict of decision, general interest or importance of the question involved in the case, or for the purpose of re-examining the existing law, as authorized by § 10, Art. V of the Constitution. There has been some persistence in

196. Abrams v. Scott, 211 S.W. 2d 718 (Mo. 1948).
197. 211 S.W. 2d 728 (Mo. 1948). See also State *ex rel.* Fawkes v. Bland, *supra* note 42.

applying for certiorari on the ground of conflict, rather than for transfer as contemplated by rule 2.06. Likewise in making applications for transfer, the sort of confusion encountered in this case in the matter of caption has been somewhat widespread These considerations have prompted the court to attempt clarification of the rule by adding this provision: 'A petition for certiorari will be considered as an application to transfer, and must comply with the provisions of this rule.' Such amendment has this day been adopted. This will obviate the necessity of making any change in the style of the case in the instances governed by the rule. Instead of making it appear that the judges of the Courts of Appeals are the parties in interest, the case will bear the same caption in this court as it did in the Court of Appeals, irrespective of which ground for transfer is invoked."